Clock Electric, Inc. *and* International Brotherhood of Electrical Workers, Local 38, a/w International Brotherhood of Electrical Workers

Congress of Independent Unions *and* International Brotherhood of Electrical Workers, Local 38, a/w International Brotherhood of Electrical Workers. Cases 8–CA–31671 and 8–CB–9165

March 18, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On July 17, 2001, Administrative Law Judge Eric M. Fine issued the attached decision. Respondent Clock Electric filed exceptions and a supporting brief, and Respondent Congress of Independent Unions (CIU) filed cross-exceptions and a supporting brief. Charging Party International Brotherhood of Electrical Workers, Local 38 (Local 38) filed separate responses to the exceptions and cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs, and has decided to affirm the judge's rulings, findings,[1] and conclusions, as modified, and to adopt the recommended Order[2] as modified and set forth in full below.

We specifically affirm the judge's conclusion that Respondent Clock Electric violated Section 8(a)(3) and (1) of the Act by granting wage increases to William Skiba and Brian Lufkin. The judge did not expressly apply the framework of the Board's decision in *Wright Line*[3] to find this violation but, as discussed below, his findings are consistent with such an analysis, which is required here. We agree with the judge that the Respondent failed to present a meritorious defense that it paid Skiba and Lufkin more money simply to dissuade them from leaving to work for another company.

In early November 1999, employees Skiba and Lufkin signed authorization cards for Local 38. On November 3, Local 38 requested recognition from Clock Electric based on a claimed authorization card majority. Clock Electric refused the request and, on November 6, held a companywide meeting to discuss opposition to Local 38. At the conclusion of the meeting, Respondent's owner, Chuck Clock, directed employees to see Primary Project Manager Dave Rohman if they wished to revoke their authorization cards. Rohman provided Skiba and Lufkin with forms that they used to revoke their cards.

At about this time, according to Lufkin's credited testimony, he asked Clock about Clock Electric's viability if Lufkin did not sign a Local 38 card. Clock replied that he and Special Projects Manager Robert Dunfee had plans for an independent union to come in so that Local 38 could not interfere with Clock Electric's operations.

Local 38 persisted in its organizational attempts, making repeated calls to persuade Clock to sign a collective-bargaining agreement. At various times, Local 38 also told Clock Electric employees, including Skiba, that if it could not organize that Company's work force, it could find jobs for employees with other, union-signatory companies. In early January 2000, Skiba and Lufkin signed second authorization cards for Local 38. Soon thereafter, Clock met with Skiba at a jobsite. Although Skiba had never mentioned leaving Clock Electric, Clock asked him whether he was planning to leave to work for a Lo-

[1] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, some of the exceptions filed by Respondent Congress of Independent Unions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the CIU's contentions are without merit.

Respondent Clock Electric has filed exceptions, inter alia, to the judge's findings that certain statements by its owner, Chuck Clock, violated Sec. 8(a)(1). Arguments in Clock Electric's supporting brief do not challenge the judge's finding that violations based on matters not specifically alleged in the complaint were fully litigated. In any event, we agree with the judge's finding that all unfair labor practice issues were fully litigated.

In Chairman Battista's view, the fact that these statements were fully litigated does not itself resolve the procedural issues of fairness and due process. Rather, Clock Electric should have been made aware, prior to the adducing of evidence concerning the statements, that such evidence was being presented in support of an allegation that the statements were unlawful. In the instant case, the statements were not alleged as unlawful in the original complaint, and the complaint was never amended at trial to allege the statements as unlawful.

Notwithstanding the above, Clock Electric does not contend that it was deprived of due process or fairness. Accordingly, Chairman Battista affirms the violations.

[2] We shall modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001). We shall also correct an error in the serial lettering of several Order provisions. Finally, we have omitted the requirement related to notice mailing in the event that the Respondent Union goes out of business or closes the facility involved in this proceeding. See, e.g., *L. D. Kichler Co.*, 335 NLRB 1427 fn. 2 (2001).

We shall substitute new notices in accordance with our recent decision in *Ishikawa Gasket America, Inc*., 337 NLRB 175 (2001).

[3] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983). See also *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996).

cal 38 contractor and what it would take to keep Skiba working for him. Skiba replied that "money is always nice." Clock then asked Skiba what it would take to keep Lufkin, who was Skiba's assistant, working for Clock Electric. Skiba advised Clock to give Lufkin a raise.

Around the same time, Clock's son-in-law, Dave Andrews, acting as an agent of Clock Electric, called Lufkin at home. Andrews stated that he heard Lufkin had signed an authorization card for Local 38. Andrews asked why Lufkin had signed the card and who else had signed cards. Andrews himself named approximately 13 people who he knew or suspected had done so. (From the beginning of Local 38's campaign, Clock maintained a list of employees who he knew or suspected had signed union cards.) Within hours, Clock also called Lufkin at home and arranged to meet with him at a restaurant that evening.

At the restaurant, Clock told Lufkin that other employees considered Lufkin to be a leader. Clock then spoke against Local 38 and about his plan to keep Local 38 out by bringing in an independent union. Clock said that if Lufkin did not go with Local 38, then five or six other employees would probably stay at Clock Electric. Effective January 10, 2000, Clock authorized an increase in Skiba's hourly wage from $21.50 to $27. Effective January 31, 2000, Clock approved an increase in Lufkin's hourly wage from $16.50 to $19.

On February 3 and 4, Primary Project Managers Dave Rohman and William Sevcheck, acting as agents of Clock Electric, visited Clock Electric jobsites and solicited authorization cards for the CIU. Rohman and Sevcheck told the employees not to worry about dues, because Clock Electric would reimburse them for the cost of the dues through raises. On February 8, 2000, Clock Electric granted recognition to the CIU. The CIU held meetings with employees on February 15 and 16. Skiba did not attend these meetings. Afterwards, the judge found, Clock told Skiba that "he was not paying Skiba all of this money" not to show up at the meetings.

The allegation that the raises given to Skiba and Lufkin were unlawful turns on proof of the Respondent's motivation. Under the *Wright Line* causation test, the General Counsel bears the initial burden here of showing that the raises were motivated, at least in part, by antiunion considerations. The General Counsel can meet this burden by showing that employees were engaged in union activity, that the employer was aware of the activity, and that the employer harbored animosity towards the union or union activity. Once this showing has been made, the burden shifts to the respondent to demonstrate that the same action would have taken place even in the absence of the protected conduct.

The General Counsel has clearly met the initial *Wright Line* burden. The credible evidence shows that: Local 38 mounted an organizing campaign among Clock Electric's employees; Skiba and Lufkin signed cards for this Union in November 1999 and again in January 2000; Clock was aware of Local 38's campaign and kept a list of its known or suspected employee supporters; Clock strongly opposed Local 38; Clock initiated discussions with Skiba and Lufkin about a pay raise soon after they signed cards in January; and Clock and his agents committed numerous unfair labor practices, including those associated with Clock's effectuation of an unlawful plan to bring in an independent union to block Local 38's campaign. This evidence warrants the inference that a motive in granting the wage increases was to discourage Skiba and Lufkin from supporting Local 38's organizational campaign.

The General Counsel's initial burden having been met, Respondent Clock Electric therefore was required to show that it would have granted the wage increases even in the absence of union activities. Clock Electric contends that Local 38 was not really organizing its employees when it gave these raises. It further claims that it had no desire to discourage support for Local 38, but that it simply wanted to keep Skiba and Lufkin, both valuable employees, from defecting to higher-paying employment with Local 38 signatories.

We find no merit in these claims. Even assuming that retaining Skiba and Lufkin was one of Clock Electric's goals, the evidence nevertheless establishes that the pay raises were an integral part of Clock Electric's efforts to counter Local 38's continuing organizing campaign and to promote the CIU as an alternative.

Contrary to Clock Electric's claim, the Local 38 campaign was active throughout January. The connection between the campaign and the pay raises is clear. When Clock began pay-raise discussions with Skiba and Lufkin, neither employee had indicated an interest in leaving Clock Electric for a Local 38 signatory employer. On the other hand, both employees *had* just shown renewed interest in collective-bargaining representation at Clock Electric by signing authorization cards for Local 38.

The connection between the pay raises and Clock Electric's efforts to promote the CIU is demonstrated by Clock's conversations with Skiba and Lufkin about an alternative union. The linkage could not have been made any clearer than when Clock scolded Skiba for failing to attend CIU meetings in February 2000. As noted previ-

ously, Clock told Skiba, "he was not paying Skiba all of this money not to show up at the meetings."

Based on the foregoing, we find that Respondent Clock Electric has failed to meet its *Wright Line* burden of showing that it would have granted pay raises to Skiba and Lufkin in the absence of protected organizational activities by Local 38. Accordingly, we agree with the judge that the wage increases violated Section 8(a)(3) and (1) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that

A. The Respondent, Clock Electric, Inc., Cleveland, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about their activities and the activities of other employees on behalf of the International Brotherhood of Electrical Workers, Local 38, a/w International Brotherhood of Electrical Workers (Local 38).

(b) Soliciting grievances from employees in order to discourage them from supporting Local 38.

(c) Promising employees wage increases in order to discourage them from supporting Local 38.

(d) Creating the impression among employees that their activities on behalf of Local 38 were under surveillance.

(e) Creating the impression among employees that their activities on behalf of Local 38 were futile because it was Clock Electric's intent to bring in another union.

(f) Coercively interrogating employees as to the reasons for their activities on behalf of Local 38, and soliciting employees to quit because of their activities on behalf of Local 38 by telling them to go to work for Local 38.

(g) Granting employees wage increases in order to discourage their activities on behalf of Local 38, provided, however, that nothing here shall be construed as requiring Clock Electric to rescind any wage increase it previously granted.

(h) Assisting the Congress of Independent Unions (CIU) by instructing its employees to attend CIU meetings.

(i) Assisting the CIU by having its agents solicit employees to sign authorization cards on behalf of the CIU and by those agents engaging in this activity during working time.

(j) Assisting the CIU by promising employees to compensate them for the cost of dues for that Union.

(k) Dominating and assisting the CIU by having its agents attend meetings conducted by the CIU, and by having them serve as representatives of the CIU during collective-bargaining negotiations with Clock Electric and as stewards for the CIU.

(l) Assisting and contributing to the support of the CIU by recognizing and bargaining with the CIU as the exclusive collective-bargaining representative of its employees, unless and until the CIU has been certified by the Board as their exclusive collective-bargaining representative.

(m) Maintaining or giving any force and effect to any collective-bargaining agreement with the CIU covering the bargaining unit of all of Clock Electric's electrical classification employees, truckdrivers, and warehouse personnel, unless and until the CIU has been certified by the Board as the collective-bargaining representative of those employees, provided, however, that nothing here shall be construed to require Clock Electric to vary any wage or substantive features of its relationship with the employees which have been established in the performance of the contract.

(n) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw and withhold recognition from the CIU as the representative of its employees unless and until the CIU has been certified by the Board as their exclusive collective-bargaining representative.

(b) Jointly and severally with the CIU reimburse all former and present employees employed by Clock Electric in the bargaining unit of electrical classification employees, truckdrivers, and warehouse personnel who joined the CIU for all initiation fees, dues, and other moneys which may have been exacted from them, with interest thereon, in the manner provided in the remedy section of the judge's decision.

(c) Preserve and, within 14 days of a request or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facilities in Cleveland, Ohio, copies of the attached notice marked "Appendix A."[4] Copies of the notice, on

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judg-

forms provided by the Regional Director for Region 8, after being signed by Clock Electric's authorized representative, shall be posted by Clock Electric immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Clock Electric to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Clock Electric has gone out of business or closed the facility involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by it at any time since January 10, 2000.

(e) Post at the same places and under the same conditions copies of Appendix B as soon as it is forwarded by the Regional Director for Region 8.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Clock Electric has taken to comply.

B. The Respondent, Congress of Independent Unions (CIU), Alton, Illinois, and Cleveland, Ohio, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Receiving assistance and accepting recognition from Clock Electric, Inc., at a time when the CIU does not represent an uncoerced majority of Clock Electric's employees.

(b) Acting as the collective-bargaining representative of the electrical classification employees, truckdrivers, and warehouse personnel of Clock Electric, unless and until the CIU has been certified by the Board as the collective-bargaining representative of those employees.

(c) Maintaining or giving any force and effect to any collective-bargaining agreement with Clock Electric, covering the bargaining unit of all of Clock Electric's electric classification employees, truckdrivers, and warehouse personnel of Clock Electric, unless and until the CIU has been certified by the Board as the collective-bargaining representative of those employees.

(d) In any like or related manner restraining or coercing employees in the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Jointly and severally with Clock Electric, reimburse all former and present employees employed by Clock Electric in the bargaining unit of electrical classification employees, truckdrivers, and warehouse personnel who joined the CIU for all initiation fees, dues, and other moneys which may have been exacted from them, with interest thereon, in the manner provided in the remedy section of the decision.

(b) Preserve and, within 14 days of a request or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its facilities in Alton, Illinois, and Cleveland, Ohio, copies of the attached notice marked "Appendix B."[5] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the CIU's authorized representative, shall be posted by the CIU and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the CIU to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Sign and return to the Regional Director sufficient copies of the notice for posting by Clock Electric, at all places where notices to employees are customarily posted.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the CIU has taken to comply.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Chose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

ment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[5] See fn. 4, supra.

Choose not to engage in any of these protected activities.

WE WILL NOT coercively interrogate employees about their activities and the activities of other employees on behalf of the International Brotherhood of Electrical Workers, Local 38, a/w International Brotherhood of Electrical Workers (Local 38).

WE WILL NOT solicit grievances from employees in order to discourage them from supporting Local 38.

WE WILL NOT promise employees wage increases in order to discourage them from supporting Local 38.

WE WILL NOT create the impression among employees that their activities on behalf of Local 38 are under surveillance.

WE WILL NOT create the impression among employees that their activities on behalf of Local 38 are futile because it is our intent to bring in another union.

WE WILL NOT solicit employees to quit because of their activities on behalf of Local 38 by telling them to go work for Local 38.

WE WILL NOT promise or grant employees wage increases in order to discourage their activities on behalf of Local 38, provided, however, nothing here shall be construed as requiring us to rescind any wage increase previously granted.

WE WILL NOT assist the Congress of Independent Unions (CIU) by instructing our employees to attend CIU meetings.

WE WILL NOT assist the CIU by having our agents solicit employees to sign authorization cards on behalf of the CIU and by those agents engaging in this activity during working time.

WE WILL NOT assist the CIU by promising employees to compensate them for the cost of union dues for the CIU.

WE WILL NOT dominate and assist the CIU by having our agents attend meetings conducted by the CIU, serve as representatives of the CIU during collective-bargaining negotiations with Clock Electric, Inc., or serve as stewards for the CIU.

WE WILL NOT assist or contribute to the support of the CIU by recognizing and bargaining with the CIU as the exclusive collective-bargaining representative of our employees unless and until the CIU is certified by the Board as the collective-bargaining representative of our employees.

WE WILL NOT maintain or give any force and effect to any collective-bargaining agreement with the CIU covering the bargaining unit of all of our electrical classification employees, truckdrivers, and warehouse personnel unless and until the CIU has been certified by the Board as the collective-bargaining representative of those employees, provided, however, nothing here shall be construed to require us to vary any wage or other substantive features of our relationship with the employees which have been established in the performance of the contract.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL withdraw and withhold recognition from the CIU as the representative of our electrical classification employees, truckdrivers, and warehouse personnel unless and until the CIU has been certified by the Board as their exclusive collective-bargaining representative.

WE WILL jointly and severally with the CIU reimburse all our former and present employees in the bargaining unit of electrical classification employees, truckdrivers, and warehouse personnel who joined the CIU for all initiation fees, dues, and other moneys which may have been exacted from them with interest.

CLOCK ELECTRIC, INC.

APPENDIX B

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Chose representatives to bargain on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT receive assistance and accept recognition from Clock Electric, Inc., at a time when we do not represent an uncoerced majority of Clock Electric's employees.

WE WILL NOT act as the collective-bargaining representative of the electrical classification employees, truckdrivers, and warehouse personnel of Clock Electric, unless and until we have been certified by the Board as the collective-bargaining representative of those employees.

WE WILL NOT maintain or give any force and effect to any collective-bargaining agreement with Clock Electric, covering the bargaining unit of all of its electrical classification employees, truckdrivers, and warehouse person-

nel unless and until we have been certified by the Board as the collective-bargaining representative of those employees.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL jointly and severally with Clock Electric, reimburse all former and present employees employed by it in the bargaining unit of electrical classification employees, truckdrivers, and warehouse personnel who joined the CIU for all initiation fees, dues, and other moneys which may have been exacted from them with interest.

CONGRESS OF INDEPENDENT UNIONS

Thomas M. Randazzo, Esq., for the General Counsel.
John Russell Steen, Esq., of Austintown, Ohio, for the Respondent Employer.
Robert G. Raleigh, Esq., of Clayton, Missouri, for the Respondent Union.
Bryan O'Connor, Esq., of Cleveland, Ohio, for the Charging Party Union.

DECISION

STATEMENT OF THE CASE

ERIC M. FINE, Administrative Law Judge. This case was tried in Cleveland, Ohio, on March 12, 13, and 14, 2001. Charges were filed by the International Brotherhood of Electrical Workers, Local 38, a/w International Brotherhood of Electrical Workers (Local 38) against Clock Electric, Inc. (Clock Electric or Respondent Employer) and a separate charge was filed by Local 38 against the Congress of Independent Unions (CIU or Respondent Union). A consolidated complaint issued on December 14, 2000.[1] The complaint, as amended hearing, alleges that: Clock Electric violated Section 8(a)(1) of the Act by its agents or supervisors interrogating employees, soliciting grievances from employees, promising pay raises to employees, and informing an employee that he should attend a meeting conducted by the CIU; Clock Electric violated Section 8(a)(1) and (3) of the Act by granting pay raises to its employees William Skiba and Bryan Lufkin; and that Clock Electric violated Section 8(a)(1) and (2) of the Act by dominating the CIU and by rendering unlawful aid, assistance, and support to the CIU, and that Clock Electric violated Section 8(a)(1), (2), and (3) of the Act by recognizing and bargaining with the CIU as the exclusive representative of certain of Clock Electric's employees, and by signing a collective-bargaining agreement with the CIU containing a union-security clause. The consolidated complaint alleges that the CIU violated Section 8(b)(1)(A) and (2) of the Act by unlawfully receiving support from Clock Electric and by accepting recognition and thereafter entering into a collective-bargaining agreement with Clock Electric containing a union-security clause. The supervisory and agency status of Field Supervisor Joseph Heibel during the time period April 18 to May 17;[2] the supervisory and agency status of Primary Project Manager (PPM) William Sevchek; and the agency status of PPMs David Rohman and David Andrews on behalf of Clock Electric were also litigated during this proceeding.[3]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs[4] filed by all of the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Clock Electric, a corporation, is an electrical contractor at its facility in Cleveland, Ohio, where it annually purchases and receives goods valued in excess of $50,000 directly from points outside of the State of Ohio. Clock Electric admits and I find that it is an employer engaged in commerce under Section 2(2), (6), and (7) of the Act. Clock Electric and the CIU admit and I find that Local 38 and the CIU are labor organizations under Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Clock Electric is principally owned and run by its president, Charles (Chuck) Clock.[5] Clock Electric has been previously found by the Board, for events in 1994, to have violated Section 8(a)(1) of the Act by photographing an employee engaged in protected activity, and to have refused to hire two applicants because of their support of Local 38 in violation of Section 8(a)(1) and (3) of the Act.[6]

Local 38 engaged in an organizing campaign at Clock Electric beginning around October 1999 and the Company had about 56 employees at that time. During this period, Clock Electric held weekly management meetings attended by Clock Office Manager Sarah Kuneo, Field Operations Supervisor Joseph Heibel, Sales Manager Mark Zell, Marketing Coordinator Helen Clock, and three estimators.[7] Clock Electric has admitted that Operations Manager Robert Coughlin and Special Projects Manager Robert Dunfee were statutory supervisors.

[1] All dates are in 2000 unless otherwise indicated.

[2] Clock Electric admitted that Heibel was a statutory supervisory outside of this time period.

[3] As a result of a unilateral informal settlement agreement entered into prior to the start of the hearing, the General Counsel's unopposed request to sever Case 8–CA–31812 from this proceeding and to withdraw consolidated complaint pars. 8F, G, and H, 10A and B, 11A, B, and C, and 14, was granted at the hearing.

[4] Counsel for the General Counsel filed a "Motion to Strike" a portion of Clock Electric's brief, and Clock Electric filed an opposition to that motion. I have granted the General Counsel's motion to strike for reasons set forth in this decision.

[5] Chuck Clock was the only individual named Clock who testified during this proceeding.

[6] See *Clock Electric, Inc.,* 323 NLRB 1226 (1997). The Sixth Circuit, on review, concluded that Clock Electric did discriminate against the two applicants, but remanded the matter to the Board to determine the number of positions available. See *Clock Electric, Inc. v. NLRB,* 162 F.3d 907 (6th Cir. 1998). On remand the Board concluded that there was only a position for one of the applicants. See *Clock Electric, Inc.,* 328 NLRB 932 (1999).

[7] Helen Clock is married to Chuck Clock.

Chuck Clock testified that he did not like Local 38, that he had held these feelings for a long time, and that he did not want Local 38 to represent his employees. Respondents' witness William Sevchek, a primary project manager (PPM) who had worked for Clock Electric for over 12 years, testified that he was aware that Clock was very antiunion, and that he had heard Clock make statements that he did not want anything to do with Local 38. General Counsel witness Heibel, a former supervisor at Clock Electric, credibly testified that during Local 38's campaign, he heard Clock say to both members of management and field employees that Local 38 was out to destroy Clock Electric. Heibel credibly testified that from the beginning of Local 38's campaign, Clock maintained a list showing the names of employees who he knew or thought signed with Local 38.[8]

On November 3, 1999, Local 38 Business Manager Sam Chilia faxed a letter to Clock stating that Local 38 was engaged in a campaign to organize Clock Electric's electrical workers. The letter requested recognition for Local 38 stating that the Union had authorization cards from a majority of the employees. The letter offered to have a card check by an independent third party as proof of majority status. By letter to Chilia, dated November 5, 1999, Clock Electric declined Local 38's request for recognition. Clock testified that he first learned of Local 38's 1999 attempt to organize his employees on receipt of the November 3, 1999 letter. However, Clock also testified that, before receiving the letter, he had heard from about 15 to 20 people, both employees and management, that there were Local 38 supporters in Clock Electric's employ. Clock testified that employees were volunteering to him, without request, the names of employees who had signed with Local 38. Clock testified that during November and December 1999 and January or February, Chilia called Clock to try to persuade him to voluntarily sign a contract with Local 38. Clock refused Chilia's requests.

B. The November 6, 1999 Letter Rescinding Local 38 Cards

General Counsel witness Bryan Lufkin worked for Clock Electric for around 5 years as an electrician until he left to begin working for a Local 38 contractor on March 1. Lufkin testified that, around the time the Local 38 campaign started, Lufkin inquired with Clock as to the viability of Clock Electric's operation if Lufkin did not sign a Local 38 card. Lufkin credibly testified that Clock stated that he and Dunfee had made plans for an independent union to quickly come in so that Local 38 could no longer "fuck" with him. Similarly, Heibel credibly testified that, sometime before his late December 1999 vacation, he suggested that Clock consider the United Electrical Workers Union as an alternative to Local 38. Clock responded that he had already talked to someone from another contractor about an independent union. Heibel credibly testified that in a second conversation with Clock, around this same time period, Clock stated that he was going to go with the CIU to keep Local 38 out. Clock told Heibel that if he was asked by anyone to name employee Jeff Poling, who used to work for a CIU represented employer, as the one who brought the CIU in because Clock could not be involved in it.[9]

Lufkin credibly testified that: Lufkin attended a staff meeting where Clock introduced Coughlin as a speaker. Coughlin spoke against Local 38 and stated that employees would work a couple of weeks if they were with Local 38 and then be laid off. After Coughlin spoke, Clock stated that employees should see Dave Rohman, who was employed at Clock Electric as a PPM, if they wanted to take back their Local 38 card. After the meeting, Lufkin left the shop and went to his car. At that time, he approached Rohman and stated that Clock said to talk to him if they wanted to take back their card. Rohman had a folder containing about 30 form letters. Rohman told Lufkin to sign the letter and Lufkin signed it.[10] The letter Lufkin signed had a typewritten date of November 6, 1999. The letter was addressed to Local 38 and to the National Labor Relations Board Region 8. It reads, in pertinent part, "I hereby revoke my authorization for Local Union No. 38 to represent me." General Counsel witness William Skiba Jr. signed a Local 38 authorization card on November 1, 1999.[11] Skiba testified that after he signed the card, Clock held a meeting where he stated that he was disappointed that there were a lot of people who had signed up for Local 38. Skiba testified that Clock stated that Rohman had signup cards if the employees wanted to revoke their Local 38 cards. Skiba testified that following the meeting he approached Rohman in the parking lot. Rohman was busy, however, Rohman subsequently approached Skiba and had him sign an identical form letter, dated November 6, 1999, to the one signed by Lufkin rescinding Skiba's Local 38 card.[12]

[8] I have credited this and other aspects of Heibel's testimony although I found his memory to be faulty in certain areas and that he exaggerated certain aspects of his testimony. In crediting certain portions of Heibel's testimony, I have considered his and other witnesses' demeanor, the probability of events, and that certain allegations Heibel made were similar to credited testimony of other witnesses. Clock did not deny the maintenance of a list of Local 38 supporters during his testimony, although counsel for Clock Electric denied the list's existence when requested to produce it at the hearing. I do not credit Clock's testimony that he had only one brief discussion with Heibel about Local 38 where he claimed that he told Heibel that, as a member of management, Heibel had to stay out of it. Clock's antipathy towards Local 38, Clock's admission that there were many conversations about Local 38 between himself and employees and members of management, and his close relationship with Heibel at the time convince me that Heibel's testimony should be credited as set forth above.

[9] Clock did not specifically deny having these conversations with Lufkin or Heibel.

[10] Two Local 38 cards with Lufkin's signature were placed into evidence. One card is dated January 3, and the other card is undated. I credit Lufkin's testimony that he signed the undated card before signing Rohman's retraction letter.

[11] While some of his evaluations listed him as a journeyman electrician, Skiba credibly testified that he always worked as a PPM at Clock Electric during the course of his employment.

[12] Skiba's testimony varied from Lufkin's in that he testified that Coughlin had spoken negatively about Local 38, at a prior company meeting, and that it was at a second meeting that Clock informed employees that Rohman had a letter if they wished to withdraw their Local 38 cards. Skiba also testified that at the second company meeting, Clock said that he would never buckle under Local 38, that he would sell the Company or go under because he did not like Local 38. Skiba's recollection as to dates was very hazy. I credit Lufkin that Coughlin spoke at the same meeting at which Clock informed employees to see Rohman if they wanted to withdraw their Local 38 cards. I credit

1. The testimony of the Respondents' witnesses

Clock testified that he called a mandatory meeting, sometime after he learned of Local 38's organizing campaign, and that he believed that it was after he received Local 38's November 3, 1999 letter. Clock initially could not recall the date of the meeting, but he later testified that he thought that it was in November 1999. Clock testified that he held the meeting because there was a rumor that he was going to retire, employees were asking him about Local 38, and Local 38 was trying to convince his employees to work for Local 38 contractors. Clock testified he asked Coughlin to relate his experiences with Local 38 at the meeting. Clock denied knowledge of the November 6, 1999 letter revoking employees' Local 38 authorization cards and he denied advising employees that Rohman was distributing such a letter.

Respondents' witnesses PPMs Rohman and William Sevchek testified that they attended the company meeting where Coughlin spoke about Local 38 and they denied that anyone said that employees could rescind their Local 38 cards at the meeting.[13] Rohman testified that he obtained the language for November 6, 1999 letter for employees to rescind their Local 38 cards from an attorney who worked with his mother at another company. He testified that the letter was typed on November 6, and Rohman started soliciting signatures on the letter a couple of days thereafter. Rohman named five people who signed the letter, including Sevchek, Skiba, and Lufkin. Rohman testified that no one from Clock Electric instructed him to draft the letter. On November 5, 1999, Clock signed off on a $2 an hour pay raise for Sevchek, effective November 1, 1999. Sevchek testified that it was the largest raise he had received to date. Sevchek testified that Rohman called him at home about the November 6, 1999 letter to revoke his Local 38 authorization card. Rohman explained that Sevchek's signing the Local 38 card gave Local 38 a chance to "get a majority of the vote to come in and organize. Retracting your card takes away another individual."

2. Credibility

It was stated in *Rawac Plating Co.*, 172 NLRB 1620, 1629 (1968), enfd. 422 F.2d 1259 (6th Cir. 1970), that:

> Credibility generally may be resolved by impeachment, substantial contradiction, or uncontroverted facts, and in many instances by objective observation of the witness' aim to result in findings based on "consistent and inherent probabilities of testimony." *Universal Camera Corporation v. N.L.R.B.*, 340 U.S. 474, 496 [1951]. There "is no reason for refusing to accept everything a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial proceedings than to believe some and not all." *N.L.R.B. v. Universal Camera Corporation*, 179 F.2d 749, 754 (C.A. 2 [1950]), reversed on other grounds 340 U.S. 474 [1951].

In *Rawac Plating Co.*, supra at 1621, the Board considered the timing of employees' discharges shortly after the employer learned of an organizing campaign amongst its employees as evidence that the reasons advanced by the respondent employer for the discharges were pretextual. See also *NLRB v. Novelty Products Co.*, 424 F.2d 748, 750 (2d Cir. 1970), where the court held that "the stunningly obvious timing of the layoffs," together with the other evidence, to be sufficient to warrant an inference of discriminatory motivation. It has also been long held that the Board is not required to accept self-serving declarations of a respondent's witnesses. See *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 469 (9th Cir. 1966).

In the instant case, I have concluded that Lufkin and Skiba, although working for Local 38 contractors at the time of their testimony, testified in a credible fashion to the extent that their memories would permit. On the other hand, I did not find the testimony of Clock, Rohman, and Sevchek to be very convincing. The timing of the Rohman's circulation of the November 6, 1999 letter for employees to retract their Local 38 cards raises the inference that Rohman acted in collusion with Clock in an effort to thwart Local 38's organization drive. In this regard, on November 3, 1999, Clock received a fax from Local 38 proclaiming majority status and requesting recognition. By letter dated November 5, 1999, Clock's attorney denied Local 38's request. On November 5, Clock signed off on Sevchek's largest pay raise to date effective November 1. On November 6, a form letter was typed for Clock Electric employees to retract their Local 38 cards. The letter was distributed by Rohman and Sevchek testified that Rohman asked him to sign the letter, which he signed, with the explanation that it would help to prevent Local 38 from achieving majority status. There is strong evidence of animus on the part of Clock Electric towards Local 38, including a prior Board finding of unfair labor practices, and Clock's admission that he continued to dislike Local 38. The timing of Rohman's distribution of the November 6 letter is unexplained, except as I have concluded that he acted in collusion with Clock to undermine Local 38's proclaimed majority status. Based on the witnesses' demeanor, and the record as a whole, I have credited Lufkin and Skiba's testimony and have concluded that on November 6, or shortly thereafter, Clock informed employees at a mandatory company meeting that they should see Rohman if they wanted to withdraw their Local 38 authorization cards. Clock made these comments at the meeting after he authorized Coughlin to speak against Local 38 on the Company's behalf.[14]

Lufkin and Skiba's testimony that Clock suggested to employees that they see Rohman about rescinding their Local 38 cards at a company meeting. I do not credit Skiba's uncorroborated testimony that Clock stated that he would sell the Company or go under because he did not like Local 38 and note that this statement was not alleged as violative of the Act in the consolidated complaint. In this regard, I have concluded that if such a statement was made by Clock, Lufkin would have remembered it.

[13] I have credited Clock's testimony over Sevchek's denial and have concluded that the meeting was mandatory.

[14] In reaching this conclusion, I have considered that General Counsel witness Joseph Heibel did not corroborate Lufkin and Skiba's testimony as to Clock's remarks at the company meeting. However, there was no evidence that Heibel had signed a Local 38 card. Therefore, he would have less reason than Lufkin and Skiba to recall Clock's instructions to employees on how to rescind their signatures from that card.

C. The January Pay Raises to Skiba and Lufkin

Skiba's evaluations reveal that he began working for Clock Electric in November 1998. Handwritten payroll records for Skiba show that, as of November 18, 1999, Skiba received three or four pay increases, with the largest taking place on November 18, 1999, in the amount of $1 per hour. Lufkin's handwritten pay records at Clock Electric show that he received six or seven raises between August 1997 and November 22, 1999, including a $1.25 an hour increase on the latter date. Lufkin's largest increase during this time period was $1.50 per hour.

On January 3, Lufkin and Skiba signed their second authorization cards for Local 38. Skiba testified, following a leading question as to the date that on January 3, at the Corsa jobsite, Clock asked him if he was going to work for a Local 38 contractor, or if he was going to stay at Clock Electric.[15] Clock asked what it would take to keep him working there, and Skiba stated that money is always nice. Clock asked Skiba what he wanted. Skiba replied $27 an hour, and Clock agreed. Skiba's handwritten payroll records show that Clock signed off on the pay increase on January 17, with an effective date of January 10, raising Skiba's pay from $21.50 to $27 an hour.[16] Clock told Skiba not to say anything to anyone about the increase because Clock was not allowed to offer a big pay increase at a time that Local 38 was attempting to organize. Skiba testified that he never mentioned to Clock that he was going to leave the Company.[17] Lufkin was Skiba's helper at the site, and Skiba testified that Clock asked him how he thought Lufkin felt about all of this in terms of whether Lufkin would go to Local 38 or stay at Clock Electric. Skiba replied that he did not know. Clock asked what Skiba thought it would take to get Lufkin to stay, and Skiba replied more money.[18]

Skiba testified that representatives of Local 38 told him that if they could not organize Clock Electric, they could find other work for the Clock Electric employees if they wanted it. Similarly, Sevchek credibly testified that he attended several meetings held by Local 38 officials. The first was in September 1999. Local 38 officials Chilia and Meaney spoke at the meeting touting Local 38 pay and benefits. They said that they wanted to get as many cards signed as possible so that Clock Electric could recognize them. Chilia also stated that Local 38 wanted to make Clock Electric a union contractor, but that if they could not establish a majority they would take as many Clock Electric employees as possible to work for Local 38 contractors as a means of breaking down the Company.

Lufkin credibly testified that around January 2000, Clock's son-in-law, Dave Andrews, an employee of Clock Electric, called Lufkin at home.[19] Andrews stated that he heard that Lufkin had signed a Local 38 card and asked why Lufkin signed the card. Andrews asked Lufkin who else had signed a card. Andrews also gave Lufkin a list over the phone of people who Andrews knew had signed a Local 38 card stating that he knew 13 people who had signed a card. Andrews asked Lufkin who was staying and who was going to leave Clock Electric. Lufkin testified that it was his belief that what he told Andrews was reported to Clock.[20]

Lufkin's credited testimony reveals that: Within 3 hours after he spoke to Andrews, Clock called Lufkin at home. Clock stated he wanted to meet Lufkin for dinner and they met that evening at a restaurant called Jean's Place. During the phone call, Clock asked Lufkin to bring some of Local 38's literature to the meeting. Once there, Lufkin showed Clock the literature, and Clock stated that Local 38 workers were working a limited number of hours. Clock stated that if they could get this other union in quick then Local 38 could not "fuck" with us. Clock mentioned that if Lufkin did not go with Local 38 then five or six other employees would probably stay at Clock Electric along with him.[21]

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[15] While I have credited the content of Skiba's conversation with Clock as Skiba described it, I do not credit his testimony that the conversation was on January 3, as Skiba had very little independent recollection of dates. However, Skiba's payroll records do support a finding that the conversation between Skiba and Clock took place in January 2000.

[16] Counsel for the General Counsel also submitted into evidence computer printouts showing Skiba's hourly rates in January 2000. However, Skiba's check date for January 21 is missing from this exhibit, and I have concluded that Clock signed off on Skiba's pay increase on January 17 with a January 10 effective date as contained in the handwritten payroll records.

[17] Clock testified as follows: Clock went out to the site at Skiba's request and Skiba brought up the Union. Clock stated that he did not know if he was allowed to talk about it, but he might be able to answer a specific question. Skiba stated that he was offered a job to go to work for a union contractor, that the money was good, but that he did not really want to go union. Clock asked Skiba what he wanted, and he replied $27 an hour. Clock said that if it is only money, fine, but that if it is a union issue, nonunion issue, "then I can't go there." Clock gave Skiba the raise and told him not to broadcast it because everyone would want a raise. Skiba quit around 2 or 3 weeks later telling Clock that Dome Pyramid kept offering him more money until he could not turn it down.

[18] Skiba testified that during one of his conversations with Clock at the Corsa jobsite, Clock asked Skiba how much he thought Lufkin should be paid, and Skiba replied $24 an hour.

[19] Andrews is actually Clock's step son-in-law.

[20] Lufkin testified that he thought that Andrews was a journeyman electrician at the time of the phone call because they graduated apprenticeship school together around June 1999. However, Andrews' testimony reveals that he in fact was a PPM at that time. Heibel, in support of Lufkin's account of Andrews' phone call, credibly testified that Andrews had informed him that he was phoning people at home who had signed a Local 38 card, or who he had thought signed a card to try to convince them to stay with Clock Electric.

[21] Lufkin gave a prehearing affidavit in September 2000. While he mentioned Andrews' phone call in the affidavit, he did not mention the followup call by Clock that same day, nor did he mention the meeting at Jean's Place on that or any other date. Nevertheless, I do not find this omission from Lufkin's affidavit sufficient to discredit this aspect of his testimony. See *Gold Circle Department Stores*, 207 NLRB 1005, 1010 fn. 5 (1973). In this regard, Clock admitted that he met with Lufkin at the Jean's Place. However, Clock testified that Lufkin called Clock to initiate the meeting in that Lufkin was unsure of which way he was going between both unions, and he wanted to talk to Clock about his future. Clock testified that he assured Lufkin that he had a bright future with the Company, but Lufkin was not sure if he was going to leave to work for a Local 38 contractor. Clock testified that, a couple of days later, Lufkin stated that he was going to stay, but he had a fam-

Lufkin testified that on January 28, his birthday, he had a conversation with Clock at the Corsa jobsite. Clock asked Lufkin how much he was being paid, and Lufkin stated $16 an hour. Clock stated that he was "fucking" Lufkin and that Lufkin deserved $2 an hour more raising his pay to $18 an hour.[22] However, Lufkin's handwritten pay records reveal that, on February 3, Clock signed off on a pay increase for Lufkin with a January 31 effective date raising his pay from $16.25 to $19 an hour.

Lufkin credibly testified that around the end of January, or early February, after Lufkin had received the pay raise from Clock, Andrews called Lufkin at home. Andrews cited Lufkin's pay raise and he wanted to know whether Lufkin was going to join Local 38 and leave Clock Electric. Lufkin stated he had not made up his mind. Lufkin credibly testified that Clock came out to the Corsa jobsite 2 or 3 days later. Clock told Lufkin that he had heard you're "fucking with me," you are going to go into Local 38 anyway. Lufkin denied it and said it was a rumor.

Lufkin testified that around 4 or 5 days later, Clock, Skiba, and Lufkin went to Tony K's Restaurant near the Corsa site. Lufkin testified that they discussed the independent union and how close Clock was to getting things done on that. Clock also stated that there was going to be a lot of money in the shop once he got rid of the dead weight concerning the people who were leaving to work for Local 38, and that Clock Electric would be a better Company without them. Clock said that if money is a problem wait until this is all over and that they would have tons of money. Lufkin testified that after lunch he returned to the Corsa site, and Clock pulled him aside and told him that he had received a $2 raise. Lufkin thought that, at that time, his pay went from $18 to $20 an hour. Lufkin testified that he believed that he only had a week or so of the $20 an hour paychecks until Lufkin left the company.[23] Skiba confirmed that he, Lufkin, and Clock met at Tony K's for lunch. Skiba testified that all he could recall about this conversation was that it was to clear the air and that Clock stated that he was not going to retire. Skiba testified that there was not much discussion about the Local 38 and CIU issue involving himself because Clock had already given him a raise. He testified that Clock and Lufkin might have discussed it. However, Skiba testified in his prehearing affidavit that "[t]here was no mention about the union at Clock, except that Chuck may have asked Bryan how he felt about the union, but I'm not sure." Clock testified that he had a lunch meeting with Skiba and Lufkin to discuss the status of their job. Clock testified that Lufkin brought up the Union, but Clock declined to talk about it. Clock testified that there was no discussion of Local 38 at all.

1. Credibility and the testimony of the Respondents' witnesses

I did not find Andrews, who had worked for Clock Electric for 10 years at the time of his testimony, to be a credible witness. When Andrews was first asked his position at Clock Electric by counsel for the CIU, he replied, "field journeyman." However, Andrews subsequently admitted when questioned by counsel for Clock Electric that he had been given business cards shortly after he had completed apprenticeship training according him the title of primary project manager (PPM). While he testified that he became a working foreman at that time and began to run work, he incredibly claimed that he did not know why he had been given the PPM job title. Andrews also testified that he spoke to Clock several times a week through a home visit or a phone call, and by conversations after work. Yet, Andrews incredibly claimed that he did not know that Clock disliked unions. Andrews also incredibly testified that Clock never said anything in his presence about Local 38 or the CIU. Andrews testified that he and Sevchek discussed Local 38 and that Andrews would ask Sevchek if anyone called him and if they still wanted him to join Local 38. Andrews testified that Lufkin was his friend and that he had called Lufkin several times. However, Andrews denied phoning Lufkin to discuss Local 38 or asking Lufkin the names of Local 38 supporters. Based on considerations of demeanor, and the content of his testimony, I have discredited Andrews' denials and have concluded that Andrews placed the phone calls to Lufkin concerning Local 38 as Lufkin credibly testified.

Clock explained the pay raises to Lufkin and Skiba by stating that they knew the project they were working on and it would be hard to replace them. He testified that they were going to leave to go to a union contractor. He testified that at first, Skiba did not want to go and that Lufkin said that he did not know which way he was going to go, but he could use more money. Clock testified that he gave Skiba the raise after Skiba told him that he was worth more money. Clock testified that he did not know whether either Skiba or Lufkin were due for a review for a raise, and that the raises were just based on the conversations that he had with the employees. Clock testified that "the union was taking guys. I was getting shorthanded. I had to do something."

In making credibility resolutions as to this aspect of the case, I have considered that Skiba and Lufkin's chronology of their discussions with Clock concerning their pay raise did not necessarily coincide with each other, or with the actual timing of their pay raises as established by the Respondent's records. I attribute these discrepancies in large part to the fading of memories due to the passage of time rather than an intent to mislead. I have considered their demeanor and have credited Skiba's testimony as to his conversations with Clock as set forth above. I have also credited Lufkin's testimony that Andrews twice phoned him and questioned him about Local 38 as Lufkin reported it, and that Clock phoned Lufkin shortly after Andrews' initial call and requested a meeting at Jean's Place

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ily and he knew that Skiba had gotten a raise. The next day Clock gave Lufkin a substantial raise. Clock did not provide a date for the Jean's Place meeting with Lufkin. I credit Lufkin to the timing of the Jean's Place meeting and over Clock as to the content of their conversation. I have concluded that Clock called Lufkin to initiate the meeting as Lufkin testified. I have considered the witnesses' demeanor and the record as a whole to conclude that Clock actively contacted employees in his efforts to combat Local 38.

[22] Lufkin later testified somewhat inconsistently to his testimony that this conversation with Clock took place on January 28, which was on a Friday, by stating that the conversation took place on a Wednesday, and that Lufkin's raise was made retroactive to the prior Monday.

[23] There were no payroll records submitted in evidence to corroborate Lufkin's contention that he received this raise.

also as Lufkin reported it. I also credit Lufkin's testimony, as set forth above, and that he had a conversation with Clock towards the end of January 2000 and that it was close in time to Lufkin's birthday, at which time Clock told Lufkin that he was increasing Lufkin's pay, without a request for that increase from Lufkin. I do not credit, Lufkin's testimony concerning the meeting between Clock, Skiba, and Lufkin at Tony K's Restaurant. All three witnesses testified that the meeting took place. However, Skiba failed to corroborate Lufkin's testimony that Clock discussed the CIU at the meeting and Lufkin did not mention such a discussion in his prehearing affidavit, although he specifically testified about the meeting in his affidavit. I have therefore concluded that Lufkin was mistaken concerning his testimony that Clock mentioned the independent union during the meeting at Tony K's Restaurant. I also note that counsel for the General Counsel did not submit any payroll records to establish that Lufkin received a second raise in January or February 2000 as Lufkin claimed, other than the one that I have concluded that he received effective on January 31. While Clock may have informed Lufkin that he was going to receive a second raise at that time, I do not have sufficient basis to conclude that this pay increase was actually implemented.

2. Positions of the parties as to the pay increases and related allegations

The General Counsel contends that the promising and granting pay increases to Skiba and Lufkin was done to discourage their support for Local 38 and thereby violative of Section 8(a)(3) and (1) of the Act. It is contended that although the pay increases and promises were couched in terms of keeping the employees at Clock Electric, it is a violation of the Act to grant employees pay raises in the midst of a union organizing drive to discourage them from supporting that union. It is contended that if Local 38 had been successful in representing Clock Electric employees, both Skiba and Lufkin would have remained in Clock's employ.

Clock Electric contends that this is not a case where wages were offered to employees to abandon their support for Local 38. Rather, it was to keep them employed with Clock Electric when they would otherwise leave the Company. It is contended that Local 38 was not attempting to organize Clock Electric. It is asserted that the complaint was amended to remove the allegation that recognition was extended to the CIU when a question of representation existed. Thus, there was no valid Local 38 drive. Rather, there was an effort to take employees from Clock Electric, and in this context it was not unfair labor practice to grant pay raises.

3. Conclusions as to the pay increases and related allegations

The facts do not bare out Clock Electric's assertion that Local 38 was not trying to organize its employees. First by November 6, 1999, a minimum of five employees had signed Local 38 cards as Rohman testified that he obtained signatures from five employees on his November 6, 1999 letter wherein the employees retracted their signatures on those cards. Moreover, on November 3, 1999, Local 38 wrote Clock stating that it had signatures of a majority of Clock Electric's employees and requested recognition by way of a card check, an offer that Clock Electric rejected. Local 38's efforts to organize Clock Electric's employees continued as Skiba and Lufkin signed new cards on January 3, and Clock testified that Chilia called him as late as January or February to request recognition at Clock Electric. Moreover, Local 38's support continued at Clock Electric into February, as CIU National Executive Vice President Paul Seiberlich testified that there were about 15 to 20 Local 38 supporters in attendance at the CIU's February meetings. Finally, Respondent witness Sevchek testified that he attended several of Local 38 meetings where he was told that the goal was to organize Clock Electric employees to obtain recognition by Clock Electric and should that fail Local 38 would try to take away Clock Electric employees as a means of breaking down the employer.

I have concluded from the forgoing that Local 38 and Clock Electric were engaged in a labor dispute where Local 38 was attempting to organize Clock Electric's employees and seeking recognition. Clock Electric was refusing to grant recognition, and as a result Local 38 was attempting to find work for Clock Electric employees with Local 38 contractors as a means of pressuring Clock Electric to relent, grant it recognition and sign a contract. Local 38's repeated requests to Clock for recognition refute any contention that Local 38 was attempting to put Clock Electric out of business.

In *M.J. Mechanical Services*, 325 NLRB 1098, 1106–1107 (1998), the Board rejected the respondent employer's contention that it was entitled to discriminate against union applicants because their activities were in accord with an objective of depriving the employer of employees. The Board approved the following rationale in rejecting the respondent's defense:

> In trying to convince MJ employees to join Local 46, the salts were exercising rights granted to them by Section 7 of the Act. There is no suggestion that they coerced, interfered with, or restrained MJ employees in the exercise of their rights. The salts merely told MJ employees about the benefits of belonging to the Union and referred them to the union hall. One apparently decided that joining was in his best interests and the other reached the opposite conclusion.
>
> Local 46's objectives are no different from that of any union. Its members are engaging in concerted activity to protect their wage rates and benefits. Their objective is to prevent contractors such as Respondent from threatening these benefits by restricting the supply of labor it can obtain at rates below that set forth in its collective-bargaining agreements. As Chief Justice Stone noted, "[a] combination of employees necessarily restrains competition among themselves in the sale of their services to the employer." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 502 (1941). The National Labor Relations Act allows employees to collectively attempt to restrict the labor supply in such a manner. If the alleged discriminatees herein convince MJ employees to join the Union and to withhold their labor from MJ unless MJ pays union scale, they would be exercising rights explicitly granted by the Act.
>
> Moreover, Respondent is simply incorrect in arguing that Local 46 was trying to drive it out of Rochester by depriving it of labor. It is abundantly clear that if MJ en-

> tered into an 8(f) agreement with the Union, it would have been provided with an adequate supply of labor to complete any project it undertook in the Rochester area. The issue between MJ and the Union was not whether Respondent worked in Rochester, it was whether Respondent worked in Rochester with employees who made significantly less in wages and benefits than union employees.

In *Arlington Electric*, 332 NLRB 845, 849 (2000), an employee was found to have engaged in protected activity when he distributed a flyer informing employees of union rates and that an IBEW local needed their services. In *QIC Corp.*, 212 NLRB 63, 68 (1974), an employer alleged that an employee was engaged in disloyalty when she and her coworkers sought employment with a competitor. The administrative law judge concluded, as affirmed by the Board that "the Respondent offered no evidence of any conduct by Aldrich or the other employees which exceeded the bounds of protected concerted activity and which constituted disloyalty within the meaning of any decided cases. The employees were bound by no contract to remain with the Respondent and, as a result, were free at any time they wished to exercise economic self-help and seek better paying jobs." In *NLRB v. Technicolor Government Services*, 795 F.2d 916 (11th Cir. 1986), the court upheld the Board's conclusions that an employee was engaged in union and protected concerted activity in distributing applications for employment with bidders competing with employer for a contract with the United States Air Force, that such activity did not lose its protection for being disloyal to the employer, and that discharge of an employee because of such conduct interfered with employees in exercise of their statutory rights in violation of Section 8(a)(3) and (1) of the Act. See also *Boeing Airplane Co.*, 110 NLRB 147 (1954), enfd. denied 238 F.2d 188 (9th Cir. 1956), where the Board majority held that the organization of a "Manpower Availability Conference" which attempted to procure job offers for Boeing employees from competitors was protected conduct in that it was designed to enhance the union's bargaining position with Boeing and for mutual aid and protection in securing alternative employment for union members.[24]

In *Huck Store Fixtures Co.*, 334 NLRB 119, 123 (2001), the Board held the following concerning wage increases it found to be violative of Section 8(a)(3) and (1) of the Act:

> Thus, the Respondent's testimony shows that the March 17 wage increases were given on an ad hoc basis rather than on the basis of any predetermined schedule and that the wage increases had not been planned before the Respondent became aware of its employees' union activity and the role that the employees' dissatisfaction with low wages played in that activity. Consequently, under these circumstances, and given the wage increases' close proximity to the unlawful March layoffs and discharges, we agree with the judge that the March 17 wage increases violated Section 8(a)(3) and (1) of the Act, as we find that they were motivated by the Respondent's desire to discourage the employees' union activities and would not have been made in the absence of such activities. See *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964) (Sec. 8(a)(1) "prohibits not only intrusive threats and promises but also conduct immediately favorable to employees which is undertaken with the express purpose of impinging upon their freedom of choice for or against unionization and is reasonably calculated to have that effect"); *Holly Farms Corp.*, 311 NLRB 273, 274 (1993), enfd. 48 F.3d 1360 (4th Cir. 1995), affd. 517 U.S. 392 (1996) (inference of improper motivation and interference with employee free choice drawn from evidence and "failure to establish a legitimate reason for the timing of the increase").[25]

I have concluded, based on the forgoing analysis, that Local 38 was engaged in a campaign to try to organize Clock Electric employees in an effort to obtain recognition and a collective-bargaining agreement with Clock Electric and that as part of that effort and in order to put pressure on Clock Electric Local 38 informed employees of the benefits of working for a union contractor and offered to place Clock Electric employees with such contractors when work became available. I have concluded that Local 38's actions constituted protected union activity and that employees listening to Local 38's entreaties were similarly engaged in conduct protected by the Act. See *M.J. Mechanical Services*, supra; *Arlington Electric*, supra; *QIC Corp.*, supra; *NLRB v. Technicolor Government Services*, supra; and *Boeing Airplane Co.*, supra. Accordingly, I have concluded that Clock violated Section 8(a)(1) of the Act when around mid-January, at the Corsa jobsite, he asked Skiba if he was going to work for a Local 38 contractor, or if he was going to stay at Clock Electric in that Clock interrogated Skiba concerning his activities pertaining to Local 38. I also find that Clock solicited grievances from Skiba in violation of Section 8(a)(1) of the Act by asking him what it would take to keep him working at Clock Electric, and that Clock also violated Section 8(a)(1) of the Act by promising Skiba a pay increase to discourage his union activities, and that Clock violated Section 8(a)(3) and (1) of the Act by increasing Skiba's pay to $27 in January, Skiba's largest raise to date, which came about directly as a result of Clock's questioning of Skiba pertaining to Skiba's union activity.[26] I have concluded that the Respondent

[24] In *Boeing Airplane Co. v. NLRB*, supra, the Ninth Circuit refused to enforce the Board's order in *Boeing*, supra. The court found the discharge there to be lawful because the union limited its association with the alleged discriminatee, and because the employee refused to give up his position as a licensed and bonded employment agent. The court noted that Boeing did not attempt to undermine the membership in the bargaining unit, and it continued to earnestly negotiate with the union. Here, for the reasons set forth below I have concluded that Clock Electric, aside from its granting of wage increases during Local 38's organizing drive, engaged in other unlawful conduct in violation of Sec. 8(a)(1), (2), and (3) of the Act in an effort to undermine Local 38's organizing drive.

[25] But see *Perdue Farms v. NLRB*, 144 F.3d 830, 833 (D.C. Cir. 1998), where the court refused to find that a wage increase violated Sec. 8(a)(3) of the Act, although the court concluded that the wage increase violated Sec. 8(a)(1). However, I am bound by Board law as to a Sec. 8(a)(3) finding, and in any event the remedy is the same if a wage increase is only found to violate Sec. 8(a)(1) of the Act. See *In Home Health, Inc.*, 334 NLRB 281, 284 (2001).

[26] While the General Counsel did not assert in the complaint that all of the remarks by Clock as set forth above, violated the Act as I have

failed to establish a legitimate reason for the timing of the increase. In this regard, Skiba had just received an increase in November 1999, and the evidence reveals that the increase came about as a direct result of Clock's questioning Skiba about his protected union activities. While Clock Electric contends that it gave Skiba the increase to prevent him from leaving to work for a Local 38 contractor, I have concluded that Skiba's discussing the possibility of leaving with Local 38 was part and parcel of his protected activity in an effort to obtain union representation and that Clock's granting him a large unscheduled wage increase was clearly motivated by his desire to discourage the employees' union activities and the wage increase would not have been made in the absence of those activities. Accordingly, I conclude that the Skiba's January wage increase violated Section 8(a)(3) and (1) of the Act.

I have concluded that Andrews, Clock's son-in-law, interrogated Lufkin as to his union activities and as to the union activities of other employees, and that he created the impression of surveillance of employees' union activities when in January, Andrews phoned Lufkin at home stating that he had heard Lufkin signed a Local 38 card, asked him why he signed the card, gave Lufkin a list of employees who he stated that he knew signed a Local 38 card, and asked Lufkin who was staying and who was leaving Clock Electric. The consolidated complaint alleges that Andrews was an agent of Clock Electric. While Lufkin did not know that Andrews was a PPM at the time he phoned Lufkin, Andrews familial relationship with Clock was known to Lufkin and is a factor to be considered in determining his agency status for Clock Electric. That is particularly so here when Andrews' conduct mirrored the anti-union positions of management. See *Aircraft Plating Co.*, 213 NLRB 664 (1974). Moreover, Lufkin's credited testimony reveals that within 3 hours of Andrews phone call, that Clock also phoned Lufkin, requested a meeting, and requested that Lufkin bring the literature that Local 38 had given him. I have concluded that Clock interrogated Lufkin about his activities concerning Local 38 in violation of Section 8(a)(1) of the Act by asking Lufkin to bring his Local 38 materials to their meeting. During their January meeting, which took place the date of Andrews phone call, Clock also spoke negatively of Local 38, and told Lufkin that if they could bring this other union in quickly that Local 38 could not "fuck" with them. By informing Lufkin of his intent to bring in another union, I have concluded that Clock informed Lufkin that his activities on behalf of Local 38 were futile, and that such conduct violated Section 8(a)(1) of the Act.[27]

Clock met with Lufkin at the Corsa jobsite towards the end of January, and Clock Electric's payroll records reveal that at that time, Lufkin was given a $2.75 an hour pay increase. It was Lufkin's largest increase to date, although he had just received an earlier increase in November 1999. Lufkin was not given any explanation for the wage increase, except that Clock asked him his hourly rate, and then told Lufkin that Clock was "fuckin" Lufkin based on what he had been paying him. I have concluded that this pay increase was linked to Lufkin's union activities as well as to Local 38's organizing drive and that Clock's raising Lufkin's pay in January violated Section 8(a)(3) and (1) of the Act for the reasons set forth above. Lufkin's credited testimony reveals that Andrews again called Lufkin at home after Lufkin had received the raise and he asked Lufkin, now that he had received a raise, whether Lufkin was going to join Local 38 and leave Clock Electric. I have concluded that by this conduct Andrews interrogated Lufkin as to his union activities in violation of Section 8(a)(1) of the Act. A few days after the conversation with Andrews, Clock approached Lufkin at the Corsa jobsite and he told Lufkin that he had heard that Lufkin was "fucking" with him in that Lufkin was going to go into Local 38 anyway. I have concluded that by this conduct Clock also interrogated Lufkin as to his union activities in violation of Section 8(a)(1) of the Act.[28]

D. The February 3 and 4 CIU Card Solicitation

On February 3, Skiba signed an authorization card for the CIU. Skiba credibly testified to the following: On February 3, Rohman and Sevchek came out to the Corsa jobsite where Skiba was working as the PPM and as such was in charge of the site. They arrived after lunch and the employees were all back to work. There were two lifts on the job, and they were both running at the time Rohman and Sevchek arrived. Lufkin was on one of the lifts. Skiba asked Rohman and Sevchek what they were doing, and he was told that they took the day off because Clock asked them to go around to talk about this other union. They stated that they did not want to go with Local 38, but wanted to keep it in house. Skiba testified that he allowed Sevchek and Rohman to talk to employees at that time because they stated that they were there pursuant to Clock's instructions. During their meeting with the employees, Rohman and Sevchek were asked how it worked, and Skiba asked the amount of union dues and who was going to pay them. Sevchek stated that they would not really pay dues because Clock would make it up with a pay raise. Lufkin asked if this was going to hurt him with his Local 38 card, and they did not know the answer. Skiba asked Sevchek in a joking fashion if Clock was going to be the president, and Sevchek laughed an said maybe. Sevchek then stated that they would vote on their officials. Sevchek and Rohman wrote down things the employees wanted such as a pay raise. In addition to Skiba, there were four or five other employees at the site. Skiba testified that the employees were paid for the time that they spent talking to Sevchek and Rohman because Skiba filled out their timesheets.[29]

found, I have concluded that the content of Clock's conversations with Skiba were fully litigated and that the credited testimony warranted the findings and conclusions of law as set forth above. See *Marshall Durban Poultry Co.*, 310 NLRB 68 fn. 1 (1993), enfd. in relevant part 39 F.3d 1312 (5th Cir. 1994), and *Monroe Auto Equipment Co.*, 230 NLRB 742, 751 (1977), where violations were found for matters not specifically alleged in the complaint but that were fully litigated.

[27] While certain of Clock's conduct, as set forth above, was not alleged in the consolidated complaint, I have concluded that the substance of these conversations was fully litigated.

[28] Again, while this conduct not specifically alleged in the complaint, I have concluded that it was fully litigated.

[29] Skiba testified Rohman and Sevchek came to the site at around 1 p.m., that they usually took their afternoon breaks around 2 p.m., and that the meeting lasted around 45 minutes.

Lufkin confirmed that Rohman and Sevchek came out to the jobsite after lunch while the employees were working. Rohman and Sevchek told Lufkin to come down from the lift because they needed to talk to him. Lufkin testified that Rohman and Sevchek said that they had taken a day off to come out and talk to the employees about the CIU for Chuck Clock.[30] They asked the employees to sign cards and stated that they were there to answer questions about the independent union. Lufkin asked if his signing a CIU card would constitute a conflict with the card that he signed for Local 38. They did not have an answer and Lufkin refused to sign the card. Sevchek wrote Lufkin's question down and said that he would get back to Lufkin. Lufkin testified that Sevchek never got back to him.[31]

Credibility and the Testimony of the Respondents' Witnesses

According to Rohman and CIU Official Seiberlich, it was Rohman who contacted Seiberlich to initiate the CIU campaign at Clock Electric. Seiberlich testified that he received the initial call from Rohman around mid- to late-January.[32] Seiberlich testified that he assumed Rohman was not a supervisor or agent for Clock Electric because, "I grilled him on it," during the phone call. He testified that Rohman informed him that he was just a field electrician. However, despite the alleged grilling of Rohman concerning his supervisory status on the phone, and of Sevchek and Rohman of the same during their February 2 meeting, Seiberlich testified that Rohman never informed him that Rohman was a project manager, and there was no claim that either Sevchek or Rohman informed Seiberlich that they were PPMs.[33]

Seiberlich testified that he traveled to Cleveland and met Rohman and Sevchek on the evening of February 2 at which time he gave them CIU authorization cards for distribution and he sent them additional cards by UPS the next day. Seiberlich testified that Rohman and Sevchek had already arranged to take February 3 and 4 off to distribute the cards by the time they met on February 2. He testified that he told them that they had to distribute the cards during breaks, lunchbreaks, and before and after work. Seiberlich testified that he told Sevchek and Rohman this because distributing the cards during working time would be illegal.

Sevchek contradicted Seiberlich's claim that he and Rohman requested vacation time for February 3 and 4, prior to the February 2 meeting. In this regard, he testified as follows:

> Q. What happened next after that meeting with Mr. Seiberlich?
>
> A. Me and Dave sat down. When we departed with Mr. Seiberlich, we decided—we had to figure out how we were going to do that as far as visiting job sites and what not, the times that we would be able to be there, breaks and lunch, and that's what we decided to do. We put in our requests for vacation, and it was okayed, and we went and visited the job sites.[34]

Clock testified that Sevchek and Rohman submitted written vacation requests for the days they went to visit the jobsites to distribute the CIU cards. He testified that vacation requests were usually approved by the operations manager and that he did not know why they took the time off. Clock testified that leave requests were supposed to be filed 2 weeks in advance, but that this policy was not enforced. He testified that it would be a violation of company policy for them to be distributing cards during working time, but that they could do it during breaks and lunchtime. He testified that he was not informed by employees or management that Sevchek and Rohman distributed the CIU cards.

Sevchek testified as follows: Rohman and Sevchek went to the Corsa jobsite to distribute the CIU cards, and it was their third and last stop on February 3. They arrived at the site about 2 p.m.[35] Skiba was running the job. Sevchek asked him if they had taken their afternoon break and he said no. Sevchek asked Skiba if they were in a good position to stop and he said yes, that he would get his guys and they would take an early break. Sevchek thought that there were three employees on the job in addition to Skiba. They were there for about 15 minutes, during which time they reviewed the CIU the cards with the employees, what Seiberlich told them the CIU was about, and answered the questions they could. They told the employees that depending on how many cards were signed, they would have a meeting with Seiberlich after they were recognized, and they could answer more questions at that time. A couple of the employees said that they needed to think about it and asked for the cards. Sevchek wrote down Lufkin's question about the effect signing a CIU card would have on the card he signed for Local 38. Lufkin refused to sign the CIU card at the time because of this concern. Sevchek told Lufkin that he would get back to him, and he did shortly after that. Rohman and Sevchek spent 2 days obtaining the cards, and at the end of the second day they mailed the cards via Federal Express to Seiberlich. Rohman testified that they arrived at the Corsa jobsite between 2 and 2:30 p.m., and that Sevchek asked Skiba if they had taken their afternoon break. Skiba said no and he agreed to Sevchek's request to take the break at that time. Rohman testified that they spoke to the men about the CIU for about 15 to

[30] Lufkin gave a prehearing affidavit on September 14. Lufkin testified in the affidavit that the employees were told that they would have to pay dues to the Union, but that Clock would increase their pay to make up the cost of the dues.

[31] Lufkin testified that lunch break was usually from 12 to 12:30 p.m., that some days it was a little longer. He estimated that Rohman and Sevchek came at around 1:15 or 1:30 p.m. However, Lufkin admitted that he stated in his prehearing affidavit that Rohman and Sevchek came at around 2 p.m., which he described in the affidavit as just after lunch.

[32] Rohman's recollection of dates was not good. Rohman could not recall when he first contacted Seiberlich stating that it was in November or December, or later than that, and that the year was 1998 or 1999. When told that Seiberlich had testified that the phone call was in January 2000, Rohman did not disagree with Seiberlich's testimony.

[33] Rohman and Sevchek did not confirm Seiberlich's testimony that he questioned them about the possibility of their being supervisors.

[34] Rohman also did not corroborate Seiberlich's testimony that they made arrangements to take leave on February 3 and 4 prior to their February 2 meeting with Seiberlich.

[35] Sevchek later stated that they arrived around 2 or 2:15 p.m.

20 minutes. Rohman and Sevchek denied making the statement that Clock said that it was all right for them to be there, or that Clock asked them to go to the site.

Rohman testified that: On February 3 and 4, Sevchek and Rohman visited five or six jobsites to solicit CIU cards. They met with employees during lunch, morning, and afternoon breaks. Rohman testified that not all cards were signed during break periods in that they met people after work and called some at their residence. However, he testified that he and Sevchek were together when they got the cards signed. Sevchek testified that he and Rohman visited three jobsites on February 3, the Randall Park Mall at 9:15 a.m. where they handed out two cards; the Cleveland State University site at about 12:10 p.m. where they had three cards signed, and the Corsa site was the last site that they went to that day. Sevchek testified that there were only around four employees at that Corsa site and that a couple of employees there requested cards but refused to sign them. He testified that these were the only cards that he solicited for the CIU that day. By Sevchek's calculations, he and Rohman had obtained a maximum of about 7 cards on February 3, during their break and lunchtime visits. However, Seiberlich's February 6 letter to Clock seeking recognition had 12 CIU cards dated February 3 attached.[36]

I have credited Skiba's testimony, based on considerations of demeanor and the record as a whole, as to the content of his conversation with Rohman and Sevchek on February 3. Skiba's testimony as to this aspect of the case was in large part corroborated by Lufkin, who also testified in a credible fashion. I note that Skiba was the PPM on the site and that his recollection appeared to be particularly clear about what transpired there. While Skiba testified that Rohman and Sevchek came to the site at around 1 p.m. and spoke to employees for about 45 minutes, these were just estimates as there was no claim by Skiba that he checked his watch as to the time of their arrival or the length of their meeting. On the other hand, Rohman and Sevchek, who were allegedly given instructions by Seiberlich to only meet with employees during breaks or lunch periods could only give an estimate as to the time they arrived at the site, as well as to the length of their meeting. While I am not convinced that the meeting lasted around 45 minutes as Skiba testified, I believe that it took longer than the 15 to 20 minutes that Rohman estimated based on the content of what was discussed as described by Skiba and Sevchek. I have also concluded as Skiba credibly testified that he was told by Rohman and Sevchek that they took the day off because Clock asked them to go around to talk about another union and that during the meeting with employees that ensued Sevchek stated that they would not really pay dues because Clock would make it up with a pay raise.

I have concluded that Rohman and Sevchek met with Seiberlich on the evening of February 2, and that based on Sevchek's testimony that they did not put in for leave for February 3 and 4 until the morning of February 3. I have concluded that the officials of Clock Electric knew the purpose of the leave request in that two PPMs requested and had leave approved on short notice for the same period of time and there was also no claim that either were instructed to keep the purpose of their leave request a secret. Accordingly, I have concluded that Clock was aware of the reason that Rohman and Sevchek requested leave, and in fact they were acting on Clock's behest when they solicited the signatures on the CIU cards as both Skiba and Lufkin testified they were informed when Rohman and Sevchek came to the jobsite. I note that Skiba, Lufkin, Rohman, and Sevchek all testified that the employees were not on break when they arrived at the site. Rather, I have concluded that Skiba interrupted the employees work at Sevchek and Rohman's request when he was informed that Clock had sent them to the jobsite to meet with the employees.

E. The February 8 Recognition of the CIU by Clock Electric, the CIU Meetings, the Contract Negotiations, and the April 26 Signing of a Collective-Bargaining Agreement Between the CIU and Clock Electric

Having only given Rohman and Sevchek CIU cards for distribution on the evening of February 2, Seiberlich sent a letter to Clock on February 6, with copies of about 30 signed authorization cards, wherein he claimed majority status on behalf of the CIU and requested recognition. By fax dated February 8, Clock Electric Attorney Jon Steen wrote to Seiberlich granting recognition to the CIU, and stating that "[w]e will be contacting you shortly to begin contract negotiations."

Seiberlich testified that he held a meeting on February 15 for Clock Electric employees at a Holiday Inn in the Cleveland area.[37] Seiberlich testified that Sevchek and Rohman were sitting at the head table with him on February 15. The CIU paid for the room and 42 to 45 employees attended. The purpose of the meeting was to formulate contract proposals and to answer employees' questions. Seiberlich testified that he had placed Steen on notice that the CIU committee would want to meet with the Employer on the morning of February 16 to negotiate with Clock Electric, providing that the CIU received contract proposals on February 15. He testified that the CIU did get its contract proposals at the February 15 meeting. Seiberlich described the February 15 meeting as "a very rambunctious meeting because we had probably 20 Local 38 guys in the meeting that were trying to disrupt my meeting."[38] Seiberlich testified that he appointed Rohman and Sevchek as union stewards, and that the men elected Andrews and Dave Gibson, as committeemen. Seiberlich testified that the meeting ended with the CIU getting its contract proposals, and that he scheduled another meeting with the men for the evening of February 16 at the same place.

The CIU's negotiating committee consisting of Seiberlich, Rohman, Sevchek, Andrews, and Gibson met with Clock Electric's committee consisting of Clock, Steen, Zell, and Dunfee on February 16 for negotiations. Seiberlich testified that the

[36] Rohman testified that they mailed 33 cards to Seiberlich via Fed Express on February 4.

[37] The CIU's office is in Alton, Illinois.

[38] Seiberlich later dropped his estimate to around 15 Local 38 supporters. Rohman testified that some of the men, who attended this meeting, were shouting ridiculous demands such as $25 or $26 an hour pay, and that the Company pay for 100 percent of medical benefits. Rohman later testified that the men were asking for $27 or $28 an hour which he testified was the wage scale for Local 38.

meeting was from around 9 a.m. to 5 p.m. However, Clock testified that the negotiations only lasted a couple of hours that day. Seiberlich testified that, prior to bargaining with Clock Electric, Seiberlich did not request any information from the company and he did not know what benefits or wage rates the company provided. Seiberlich testified that through the negotiations on February 16 they were able to reach agreement in principle to the terms of a collective-bargaining agreement.

Seiberlich met with the employees on the night of February 16 at the same Holiday Inn, which was again paid for by the CIU.[39] Seiberlich testified that 51 or 52 people attended the meeting and that it was a very boisterous meeting due to disruptions caused by Local 38 supporters. He estimated that 20 or more Local 38 supporters attended the meeting and stated that they asked questions designed to disrupt the meeting.[40] Seiberlich presented to the employees the contract Clock had offered. Seiberlich testified that there were no questions about the contract that he failed to answer. However, Lufkin credibly testified that he asked a question about holiday pay that Seiberlich refused to answer, and that Seiberlich also refused to answer a question that he asked about union dues. Seiberlich testified that at the end of the meeting the CIU held a secret-ballot election in an effort to ratify the contract. The proposed contract was rejected with a vote that Seiberlich estimated at 27 to 24. Lufkin credibly testified that he did not feel that the ballot was secret in that the people at the main table were positioned so that they could see how he voted. He testified that Kotlarek was standing next to the podium when Lufkin voted, and that there was another person standing at the podium.[41]

Skiba credibly testified that he did not attend any of the CIU meetings and that after the second or third CIU meeting, Clock told Skiba that he was not paying Skiba all of this money not to show up at the meetings.[42] Skiba testified that he was also asked during several phone calls by Andrews and Rohman to attend the CIU meetings. Skiba was informed over the company pagers of the dates, times, and place of the CIU meetings.

Seiberlich left town on February 17. Seiberlich testified that, during the period from February 16 to around the beginning of April, he remained in phone contact with Rohman who told Seiberlich that the CIU committee was continuing to meet with Clock Electric. Eventually Seiberlich received a call and was told that the CIU committee had what they thought would sell to the employees. In this regard, Clock Electric had agreed to raised its offer of a second year increase from 3 to 4 percent, and agreed to increase the percentage it paid for health insurance. Seiberlich did not attend these interim negotiations with the Employer, which were attended by Rohman, Sevcheck, Gibson, and Andrews for the CIU. He testified that it was not necessary for him to play a role in the interim bargaining in that Seiberlich told the CIU committee to keep him posted and that the contract proposals were to be whatever the men wanted.

Rohman testified that the four-member CIU committee consisting of himself, Andrews, Sevchek, and Gibson had one meeting with Clock that he could recall concerning negotiations. Rohman testified that he and Sevchek were the chief spokesmen and that the meeting lasted around 3-1/2 hours or longer. However, Sevchek testified that the CIU committee had two meetings with Clock and Steen that they were in April with the first meeting lasting around 30 to 45 minutes, and the second meeting only lasted 30 minutes. Sevchek testified that he thought that there were only two changes to the contract that the employees had previously rejected resulting from these meetings and that "[t]hey were very minor changes." Sevchek explained that the CIU committee knew that they had to make some "minor adjustments" to the contract in that they could not have the employees vote on the same contract again. Following their meeting(s) with Clock, the CIU committee met with around 20 to 25 employees at a place called the Brown Derby restaurant and informed the employees the terms of their new understanding with Clock. Only CIU card signers attended this meeting.

Seiberlich met with Clock Electric employees in Ohio on April 25. Around 37 employees attended the meeting, including about seven Local 38 supporters. The employees voted to ratify the revised contract at the meeting. The meeting was of short duration and few questions were asked. On April 26, Seiberlich and the CIU committee met with the Clock Electric representatives and the collective-bargaining agreement was signed.[43] Seiberlich left Cleveland on April 27 and, at the time of the hearing, had not returned to meet with employees. The collective-bargaining agreement ran from May 1, 2000, through April 30, 2003, and had a union-security clause requiring membership in good standing after a 30-day grace period with the requirement that the employees pay initiation fees, dues, and fees normally required.

Clock testified that the employees received new benefits as a result of the CIU collective-bargaining agreement, including: improved overtime benefits; increased pay for working on a holiday; an agreement to rotate apprentices; full-time employment opportunities for regular employees before using temporary agencies; a new program for testing out helpers; pay increases including $1.50 an hour the first year and 4 percent each the second and third years; minimum rates in accord with the ABC annual wage survey; a minimum rate for new drivers; a 25-cent-shift differential; improved standby and showup pay; layoffs absent discipline were to be done by seniority and job classification; and health insurance went from a 50-percent employer contribution to 60/65/70 percent over 3 years.

[39] Lufkin attended this meeting and credibly testified that Seiberlich, Andrews, Rohman, Sevchek, and electrician Mike Clark (Kotlarek) were sitting at the head table.

[40] Seiberlich testified that one of the Local 38 supporters gave the CIU committee a list of questions that Local 38 had given him to ask, a copy of which was submitted into evidence. The last page of the document is entitled, "Questions to ask a Yellow Dog Union Rep."

[41] Sevchek testified that Mike Collard (Kotlarek) was standing around 3 feet from the podium to make sure that people did not vote twice. Rohman testified that he was standing near the podium where people voted, but that he could not see how people voted.

[42] Based on considerations of the witnesses demeanor, I have credited Skiba over Clock's denial that he made this remark. I have concluded that Clock's statement to Skiba took place in February since Skiba left Clock Electric's employ in early April, prior to the third CIU meeting.

[43] When he testified, Seiberlich was not aware that the collective-bargaining agreement did not have an arbitration provision.

F. The March Interrogation of James Bratsch

Bratsch worked for Clock Electric for around 18 years. On February 23, Chilia sent Clock a letter on Local 38's letterhead listing Bratsch and eight other individuals stating that the following named individuals demand Local 38 wages and benefits.[44] Clock testified that around the time of his receipt of Chilia's letter the nine employees named there were issued suspensions by Clock Electric while they were working at the Dorn Color project. Clock testified that the nine employees went on strike the day that they were issued the suspensions.[45] Bratsch testified that around March 2000, Bratsch went to Clock Electric to pick up his last check. At that time, he was asked to turn in his gas card, Home Depot credit card, pager, keys, and tools. Bratsch saw Clock, Dunfee, and a couple of other people in the office and he had a conversation with Clock. Bratsch credibly testified that Clock asked why Bratsch changed his mind about wanting the Union, and he told Bratsch to go work for the Union. Bratsch's testimony was not contradicted by Clock. Bratsch worked for Clock Electric as an electrician at the time of this conversation.[46] I have concluded that although Bratsch was an open Local 38 supporter that, considering the totality of the circumstances, Clock's statements to Bratsch were coercive. I have concluded that Clock violated Section 8(a)(1) of the Act by interrogating Bratsch as to the reasons for his union activities, and by soliciting him to quit by telling him to go to work for the Union. See *Nicholas County Health Care Center*, 331 NLRB 970 (2000).

G. Heibel's Attendance at the CIU's April 25 Contract Ratification Meeting

Counsel for the General Counsel called Robert Joseph (Joe) Heibel as a witness. Heibel worked for Clock Electric for around 13 or 14 years and he left Clock Electric's employ in November 2000. At the hearing, counsel for Clock Electric stated that Heibel, as field operations supervisor, was a statutory supervisor prior to April 18, 2000, at which time he was returned to the field to work as an electrician. It was asserted by counsel for Clock Electric that Heibel worked as an electrician until May 17, 2000, when he returned to his supervisory position.[47]

Heibel attended the April 25 CIU meeting at Whirly Ball facility and he voted on contract ratification at the meeting. He testified that Clock told him that in order for him to vote for the CIU contract that Heibel would have to be a field employee prior to the vote. As a result, Heibel was required to return to the field to work as an electrician from mid-April to mid-May. Heibel testified that his title did not change, and that his duties did not change during the month-long period in which he returned to the field. He testified that while in the field, he had a cell phone and pager and that he would receive and respond to scheduling and other questions about other jobsites. However, while he initially claimed that his supervisory duties did not change while he was in the field, Heibel admitted that he performed hands-on electrical work 8 hours a day while he was in the field and that he no longer performed his prior functions as field operations supervisor of visiting jobsites, making up the work schedules, and working with the estimators. While he testified that his job title did not change while he was in the field, Heibel signed a CIU card on April 25 listing his work as an electrician.

Heibel testified that he returned to the field after the nine employees left Clock Electric to seek jobs with Local 38, making it difficult for Clock Electric to complete its work.[48] However, Heibel denied that he went back into the field because of a shortage of electricians at Clock Electric. He testified that they used agency people to fill in for the people who had left. Heibel testified that when he returned to the field, he volunteered to go to the conservatory project jobsite because it was near his home and it was a prevailing wage job.

Clock testified that Heibel volunteered to return to the field because the Company lost a lot of employees and the job that he was assigned to was 5 minutes from his home. Clock testified Heibel's field assignment was listed on the work schedule but there was nothing in Heibel's personnel file to show a change in work status. Clock admitted that, while he was in the field, they called Heibel to ask him questions regarding the status of jobs. Clock testified these type of questions ended within a week after Heibel went to the field, and thereafter, it was minimal. Clock testified that when they picked up some temporary agency electricians they were able to return Heibel to his former position.

Counsel for the General Counsel argues in his posthearing brief that Heibel voted on the CIU contract on April 25, 2000, and that Heibel was a supervisor at that time, even though the Respondent employer asserts that he was placed in the field. However, there is no complaint allegation that Heibel's attendance at the April 25 meeting violated the Act. Moreover, while I have credited Heibel to the extent that Clock told him that his returning to the field would allow him to vote on the CIU contract, Heibel's initial contention that his supervisory duties did not change while he was in the field was undercut by

[44] Bratsch and the other eight employees listed in Chilia's letter were alleged as discriminatees in the consolidated complaint for having been suspended on February 25. However, this aspect of the complaint was withdrawn due to a prehearing settlement.

[45] Clock testified that the employees remained on strike against Clock Electric at the time of his testimony in March 2001, although they were working for Local 38 contractors.

[46] Counsel for Clock Electric stipulated that Bratsch was not a statutory supervisor at the time of this conversation, although he had worked in that capacity for Clock Electric in the past.

[47] Heibel testified that he left Clock Electric's employ because Clock asked him to fabricate a story on Clock Electric's behalf concerning a workmen's compensation claim. Clock denied this allegation and testified that Heibel left on good terms for an opportunity for advancement. I do not have a sufficient basis on the record before me resolve this particular credibility dispute nor do I believe that it is central to the outcome of this case. Assuming that Heibel did leave Clock Electric on good terms as Clock contended, such a finding could only add credence to Heibel's testimony against the Company. Heibel did testify that he was a member of another IBEW Local at his new place of employment where he was contacted at work by Local 38 representatives to be a witness in this case. Heibel testified that he felt a little uncomfortable by this contact concerning his relationship with his new employer.

[48] Similarly, Clock testified that when the nine employees went on strike in February, it made it difficult to complete the work on time.

subsequent admissions during his testimony. Heibel also admitted that there was a need for him in the field due to loss of employees, and while he testified that Clock Electric was able to make up the loss of employees through the use of temporary employees, no evidence was placed on the record as to when these temporary employees were hired. Finally, while he contended that he considered himself a supervisor while he worked in the field, Heibel signed the CIU card on April 25, identifying himself as an electrician. I have concluded that the General Counsel has failed to demonstrate that Heibel was transferred to the field for reasons other than legitimate business concerns raised by Clock Electric. Moreover, the General Counsel has failed to establish that Heibel maintained sufficient authority on April 25 to render him a statutory supervisor at that time, or to warrant a finding that his attendance at the April 25 meeting violated the Act. I note that Heibel failed to testify that he was guaranteed a return to supervisory position when he returned to the field or that there was a date certain of his return to that position.[49]

H. The General Counsel's Motion to Strike

Following the filing of posthearing briefs, counsel for the General Counsel filed a motion to strike a portion of Clock Electric's brief, and Clock Electric filed a response in opposition to that motion. The disputed portion of Clock Electric's brief reads, in pertinent part:

> the last minute taking of an affidavit from an alleged agent of Respondent Employer, without notice or an opportunity for the Respondent Employer to be present in violation of both the Board's own rules and the code of conduct for Attorneys in Ohio that the hearing in this matter was nothing more tha(n) a scavenger hu(n)t by the Regional Office and the Charging Party. (Clock Electric Br. at 32.)

Clock Electric was referring to counsel for the General Counsel's interviewing Heibel, a former supervisor at Clock Electric without affording Clock Electric the opportunity to be present at the interview.

I have considered the opposing positions concerning the General Counsel's motion to strike and have decided to grant said motion. Counsel for the General Counsel's interviewing Heibel, who was no longer in Clock Electric's employ at the time of the interview, without first notifying Clock Electric was in accord with Board casehandling procedures as well as established Board precedent in that as an ex-employee Heibel was not an agent of Clock Electric at the time he met with counsel for the General Counsel. See NLRB Casehandling Manual (Part One), Unfair Labor Practice Proceedings, Section 10056.6. This manual provision is in accord with Board law. See *Southern Maryland Hospital*, 288 NLRB 481 fn. 1 (1988). Moreover, Clock Electric raised no objection to Heibel's testimony at the time of the hearing, and Heibel's affidavit revealed that he came forward of his "own free will" and that he "knowingly" declined to have legal counsel from Clock Electric present. See *Singer Co.*, 176 NLRB 1089, 1090 (1969), enfd. in pertinent part 429 F.2d 172 (8th Cir. 1970). Thus, I have concluded that counsel for the General Counsel has acted in conformance with Board law in contacting Heibel, and counsel for Clock Electric has cited no Board ruling or procedure to the contrary.[50] Accordingly, counsel for the General Counsel's motion to strike this portion of Respondent Clock Electric's brief is granted.[51]

I. The Supervisory Status of PPM Sevchek

Clock testified that his management team for the field staff are the operations manager, the estimators, and the field superintendent. The other field positions are primary project manager (PPM), project manager, lead journeyman, journeyman, apprentice, and helper. Clock testified that a PPM will oversee employees on the jobs, including conduit crews, wire pulling crews, panel setting crews, and light hanging crews. The PPM selects who performs what tasks. The PPM also works with the

[49] Heibel testified that, around October or November 1999, he was instructed by Clock to keep known or expected Local 38 supporters working on certain jobsites to isolate them from other employees. Heibel testified that he followed the directive. Heibel named eight people who he stated that he had been told by Clock to assign to a particular site. However, when he was shown the work schedules for this time period, Heibel could not point to the jobsites or the dates that this occurred on the schedules. Heibel's response was, "I didn't have my dates correct, I guess, but I can remember at one time, I don't have a time or date, that those individuals were scheduled at Dorn Color under Albert Higgley and Company on the schedules." Clock testified that the nine individuals named in Chilia's February 23 letter were assigned to the Dorn Color project, that they went on strike around that time, and that he knew that they were Local 38 supporters for some time before their names appeared on the letter. However, Clock denied directing anyone to send these employees to the Dorn Color project. There is no complaint allegation before me that Clock Electric violated the Act by trying to isolate Local 38 supporters. Counsel for the General stated at the hearing that Clock's directive to Heibel took place in October and November 1999, outside the 10(b) period of the Act and was being relied on as background evidence of animus. I do not find that the General Counsel has established that Heibel was directed to isolate Local 38 supporters in October or November 1999, and any related conduct that may have taken place around February 2000 was not alleged in the complaint and was not fully litigated at this proceeding.

[50] Since I have concluded that counsel for the General Counsel's pretrial meeting with Heibel was in conformance with Board procedures, I do not find in necessary to reach the parties contentions concerning Ohio's Code of Professional Responsibility.

[51] Heibel gave an affidavit to the Board on March 9, 2001, the Friday before the unfair labor practice trial. Counsel for the General Counsel and counsel for Local 38 were present. Heibel testified in the affidavit that "I have, over the years, been aware of Chuck Clock's dislike and disdain for the IBEW Local 38." However, Heibel admitted, on cross-examination at the hearing, that he did not know what the word "disdain" meant. Heibel also testified that there was some language in quotes in the affidavit that should not have been in quotes in that he did not have verbatim recall of the conversation. He testified that he read the affidavit, but that he did not pay attention to the quotations. While I have concluded that use of the word "disdain" in the affidavit was not Heibel's choice, I do not find that this was a sufficient basis to discredit Heibel. In this regard, Clock admitted that he had a longstanding dislike of Local 38, and Heibel credibly testified at the hearing that on more than one occasion he heard Clock voice that dislike. While I do not condone an affidavit being written in language other than the affiant's, I have concluded that the affidavit accurately reported the witness's views on the point in question.

tools. Clock testified that the difference between a PPM and a project manager are the number of people they may run on a job. According to Clock, a PPM would run jobs with 5 or more employees with a maximum of 20, a project manager may have one to seven employees, and a lead journeyman will run a job with another journeyman, or an apprentice, or a helper. However, the testimony of Skiba and Andrews as well as work schedules that were entered into evidence reveal that the PPMs routinely run smaller crews than Clock's testimony reflects.

Clock testified that the PPM has no involvement in hiring, firing, or discipline, and cannot effectively recommend discipline. Clock makes the final decision if an employee needs to be disciplined. The field superintendent may sometimes recommend discipline. The PPM does not receive notice of disciplinary action pertaining to an employee. Clock testified that the Company relies on PPM's reports to discipline to the extent that they get information that there is a problem. Clock testified that Sevchek and Al Conn were PPMs in 1994. Sevchek filled out a foreman's daily log for the date June 15, 1994, pertaining to then Clock Electric employee Orin (Chip) Lemin. It states in the log that "Chip Lemin was told to pick up the pace as far as his productivity on the job." This notation was subsequently summarized and typed into a document pertaining to Lemin entitled "Disciplinary Time Line" under action taken which cited a number of incidents leading to Lemin's discharge. Moreover, Conn signed off on a written warning to Lemin dated July 8, 1994, which was issued to and signed by Lemin in a document entitled "Employee Disciplinary Report." Clock testified that Conn issued the warning to Lemin without Clock's knowledge and in contravention of company policy in that only Clock had the authority to issue such discipline.[52]

Heibel was called as a witness by the General Counsel. At the time that Heibel left Clock Electric in November 2000, he was field operations supervisor, a position he had held for around 3 years.[53] Heibel's responsibilities as field operations supervisor included, scheduling and evaluating all field personnel and working closely with Clock and the estimators on the day-to-day business of running Clock Electric. Heibel testified that, as field operations supervisor, the positions of PPM, project manager, and lead journeymen reported directly to him and he was their immediate supervisor. Heibel testified that they had no authority to hire or fire, and they had no authority to recommend discipline. If there was a problem with an employee they had authority to send them back to the shop. The employee would then see Clock or Heibel, at which point they would decide what to do.

Sevchek worked for Clock over 12 years and he had been a PPM since at least 1994. Sevchek described himself as a working foreman. He testified that in late 1999 through 2000, there were about 11 people with the PPM title working at Clock Electric, including Skiba. Sevchek testified that as a PPM he receives a set of drawings or blue prints from an estimator. Thereafter, the PPM coordinates the work with the other trades and tries to complete the job on time and within budget. Sevchek testified that he would be questioned if there were delays on a project. Sevchek assigned all of the work on the projects where he worked as the PPM. He made the assignments based on the employees' skills. Sevchek called the office to seek approval if an employee wanted to arrive an hour late for work, but he independently approved employees coming in 15 minutes late. As PPM, he sets the time for lunch break, depending on the pace of the job.

Sevchek testified that he cannot hire, fire, or discipline, nor does he make recommendations for discipline.[54] If there is a problem with someone on his crew, depending on the severity of the problem, he tries to work it out with the employee on the job. If it persists, he contacts his supervisor, informs them of the situation, and then it is up to them to deal with it. Sevchek will record problems on his foreman's daily report, as he did for Lemin in 1994. Sevchek turns the report into the office, does not know who reads it, and with respect to Lemin did not know if his notation resulted in Lemin being disciplined. Sevchek testified that he would tell employees to get moving and that would be the extent of his verbal reprimands. Sevchek told a former helper to put in an application for employment with Clock Electric, and he told Clock that the employee had worked with him in the past and at that time was a good worker. The employee was hired.

Sevchek, on occasion has attended job meetings with general contractors where he is the sole representative of the Company if the estimator cannot attend. However, what transpired at these meetings was not established on the record. Sevchek testified that he preferred working and letting the estimators go to the meetings. Sevchek has a Home Depot card and will purchase small supplies for a job on occasion. Sevchek testified that, at the time of the hearing, he was the second most senior PPM.

Andrews testified that he was given business cards with the title PPM when he completed apprenticeship training around June 1999 and at that time he started to run work for Clock Electric. Andrews explained that he worked along with the men and runs pipe, but that he also coordinated the job, ensured that the work is completed on time, and ordered material. Andrews gave employees their assignments and made sure they were completed. He testified, on cross-examination, that he gave assignments based on his experience and that he used "independent judgment." Andrews will hear about it if a project comes in late. Andrews testified that more than one PPM

[52] Lemin was an alleged discriminatee in the prior Board litigation involving Clock Electric. See *Clock Electric, Inc.*, 323 NLRB 1126 (1997), enfd. in pertinent part 162 F.3d 907 (6th Cir. 1998). There, Clock Electric was found to have violated Sec. 8(a)(1) of the Act by Conn's photographing Lemin engaging in picketing activity. The administrative law judge found that Conn was directed to photograph Lemin by Clock Electric's front office. Clock Electric argued as an affirmative defense that it had instructed its foreman, of which Conn was one, to photograph picketing in an effort to prove unlawful activity. Conn's status as a statutory supervisor was not made clear in the administrative law judges findings.

[53] The title changed from field operations manager to field operations supervisor around October 2000. However, there was no change in the job. Clock Electric concedes that Heibel was a statutory supervisory while in the position of field operations supervisor.

[54] Skiba, Rohman, and Andrews also testified that as PPMs that they could not hire, fire, or discipline employees.

can be assigned to a job depending on staffing, but the field supervisor will select only one of those individuals to run the job and that person will have the job plan, give the assignments and have the final word on how the work is performed. Andrews testified that as a PPM he has had at most had four employees working under him. However, on occasion there will be jobsites where one PPM is in charge of up to 20 employees. Andrews testified that Sevchek had probably served as PPM where there were up to 20 men at his jobsite. Andrews attributed this to Sevchek's greater experience level. Andrews did not attend meetings at the jobsite as part of his functions as a PPM and he did not have use of a company credit card.

Skiba testified that he was a PPM when he worked for Clock Electric. Skiba testified that, as a PPM, he worked with his hands but he was in charge of getting the employees working and of informing them which way to run the pipe. Skiba testified that Field Supervisor Heibel wanted Skiba to report to him every day, but that he would talk to him about every other day, which met with Heibel's disapproval. As PPM, Skiba would get to the job early, make sure that the generator was running, and schedule the jobs that the other employees would do, whether it was running pipe or pulling wire. After Skiba gave the assignments to others, he would then perform one of the assignments himself. Skiba testified that he had the same job for his new employer and that he was a member of Local 38 and covered by Local 38's collective-bargaining agreement. He testified that he worked with other PPMs at Clock Electric and that their duties were essentially the same as his. Skiba testified that as PPM, that he would probably have at least four people working under him, but that it could go up to as many employees as was needed. Skiba testified that when work was slow, he worked jobs for other PPMs where they would be in charge of the site.

Conclusions as to Sevchek's Supervisory Status

The General Counsel and Local 38 contend and the Respondents deny that PPM Sevchek is a supervisor and agent of Clock Electric within the meaning of Section 2(11) and (13) of the Act. Sevchek, Andrews, and Rohman were listed as project managers in the consolidated complaint and all three were alleged to be statutory supervisors and agents of Clock Electric. At the outset of the hearing, counsel for the General Counsel successfully amended the complaint to allege that Andrews and Rohman were only agents but not supervisors of Clock Electric, while continuing to maintain that Sevchek was both a supervisor and agent. The testimony of these three individuals as well as that of alleged discriminatee Skiba revealed that all four had the job title of primary project manager (PPM) during the relevant time period herein. Counsel for the General Counsel argued, in his posthearing brief that Sevchek is a supervisor because he uses independent judgment in the direction of employees' work, and Clock Electric's job description for PPM provides that "he 'supervises assigned job site employees to complete project.'" It is argued that the job description provides that the PPM "effectively utilizes management skills in directing supervision of supervisors and crew along with coordinating crew activities within the scope of his duties." It is asserted that Sevchek also disciplines employees. Counsel for the General Counsel then goes on to state that "the record reveals that Rohman and Andrews effectively direct the work of employees in the exercise of their duties." (GC Br. at 16.) However, counsel for the General Counsel provided no explanation as to why Rohman and Andrews and for that matter alleged discriminatee Skiba, who as PPMs are the subject of the same job description as Sevchek are not statutory supervisors.[55]

The burden of proving that an individual is a supervisor within the meaning of the Act rests with the party asserting it. *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001). Section 2(11) of the NLRA defines "supervisor" as

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In *NLRB v. Kentucky River Community Care*, supra at 1867, the Court stated Section 2(11) of the Act:

> sets forth a three-part test for determining supervisory status. Employees are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions, (2) their "exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment," and (3) their authority is held "In the interest of the employer." *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 574, 114 S.Ct. 1778, 128 L.Ed.2d 586 (1994).

In *Iron Workers Local 28 (Virginia Assn. of Contractors)*, 219 NLRB 957, 961 (1975), the Board approved the following findings and conclusions concerning a group of working foremen in the construction industry:

> The remainder of the evidence demonstrates that the foremen act within a very limited sphere in giving instructions to employees, bounded by the blueprints and instructions from the contractor or his supervisor. Any recommendations made by the foreman with regard to discipline or discharge, are adjudged independently by the contractor. Therefore there is no competent evidence to demonstrate that the vast bulk of the foremen are anything more than pushers or strawbosses and consequently not supervisors within the meaning of the Act because they appear not to be able to effectively recommend discharge or discipline and their authority appears to be routine and not requiring the use of independent judgment.
>
> The general foreman, who is employed when there are five or more crews of foremen and journeymen, is an addi-

[55] Counsel for Local 38 also cites the PPM job description and asserts, in his posthearing brief, that Sevchek, Andrews, and Rohman are all supervisors within the meaning of Sec. 2(11) of the Act and/or agents within the meaning of Sec. 2(13) in that they responsibly direct, assign, and discipline other employees. Counsel for Local 38 does not explain why if all the PPMs are supervisors that alleged discriminatee PPM Skiba is not.

> tional layer on top of the foremen, but at the same time, he is employed only on the basis of a mathematical formula. He would parcel out to the crews the jobs to be done in the same way that a foreman would parcel out the jobs to his crew. He reads the blueprints and, together with the foreman, sets up what is to be done. Although his is a layer above the foreman, there is no evidence to suggest that he has any more responsibility to effectively recommend action or exercises independent judgment than do the foremen.
>
> On the basis of the evidence received, I conclude that it has not been demonstrated that the foremen and general foremen as a class come within the intendment of the word supervisor as defined by the Act. Therefore, since the available evidence does not demonstrate that the foremen and general foremen occupy a position other than a strawboss or pusher and does not conclusively show that they are supervisors within the meaning of the Act, ...[56]

I have concluded that Sevchek was no more than a leadman or strawboss. The General Counsel and Local 38 assert that he had the ability and used "independent judgment" to responsibly direct, assign, and discipline employees. However, General Counsel witness Heibel credibly testified that he was the direct supervisor for approximately a 3-year period of all of the Respondent's PPMs, project managers, and lead journeyman. Heibel corroborated Clock and Sevchek's assertion that the PPMs had no authority to hire, or fire, or recommend discipline. Rather, if there was a problem the PPM would send the employee back to the shop and the matter would be investigated. Similarly, Sevchek credibly testified that he would record an incident with employees on his foreman's logs and turn them into the office. He did not know what happened to the report thereafter. While one of these reports showed up in 1994 in an employees disciplinary record, there was no showing that Sevchek was aware that it was used in that capacity or otherwise consulted about its usage.[57]

I also conclude that Sevchek, as a PPM, did not use "independent judgment" in the assignment or direction of work at the jobsites. Clock's testimony revealed that the work was repetitive in nature in that there were conduit, wire pulling, panel setting, and light hanging crews. Skiba's testimony revealed that the employees' assignments consisted of running pipe or pulling wire. Sevchek testified that he would receive blue prints or drawings from estimators and then give employees their assignments. While he testified that he considered an employee's skills in making assignments, Clock's testimony revealed that the employees below the PPM were classified as project managers, journeymen, apprentice, and helper. Since the work is repetitive and the employees are classified as to skill level, I conclude that the assignments and direction that the PPMs gave was routine in nature, and did not require the use of independent judgment as required to establish supervisory status. Skiba testified that all PPM's work was essentially the same, and that he gave his crew their assignments in the morning, and that he also took one of those assignments and then worked with his hands. While Sevchek was not specifically asked, I have concluded, based on Skiba's testimony, that Sevchek likewise spent the majority of his time performing hands on electrical work. Moreover, the credited testimony revealed that PPMs rotated to work as regular electricians under other PPMs depending on who was designated the PPM in charge of the jobsite. Clock Electric submitted into evidence work schedules for November through December 1999, showing that while Sevchek did serve as a PPM in charge of up to five employees at a jobsite during this period, he spent most of his time working as electrician for other PPMs or running smaller projects with one to two electricians. Thus, I have concluded that the General Counsel has failed to establish that Sevchek was a statutory supervisor within the meaning of Section 2(11) of the Act, and that the record does not warrant a finding that either Andrews or Rohman were statutory supervisors as contended by Local 38.[58] However, for the reasons set forth below, I have concluded that Sevchek, Andrews, and Rohman acted as agents for Clock Electric, within the meaning of Section 2(13) of the Act, in its efforts to combat Local 38 and recognize and bargain with the CIU.

J. Complaint Allegations Relating to Clock Electric's Domination, Assistance, and Recognition of the CIU

In *Machinists Local 35 v. NLRB*, 311 U.S. 72, 80 (1940), the Court concluded that there was substantial evidence that the petitioning union had been assisted by unfair labor practices of the employer and therefore the Board was justified in refusing to give effect to the petitioner's closed-shop contract. The Court held that:

> To be sure, it does not appear that the employer instigated the introduction of petitioner into the plant. But the

[56] Similarly, in *Electrical Workers Local 3 (Cablevision)*, 312 NLRB 487, 488–489 (1993), foreman Monopoli was found not to be a statutory supervisor where he routed and dispatched work to 13 to 17 technicians, ensured that the work was completed, and assisted employees in the field if they needed help. Monopoli spent 50 percent of his time working with his hands with employees. He provided technical assistance to less experienced employees, and if a problem with an employee arose he would document it and send it to the human resource department which investigated the matter. See also *George C. Foss Co.*, 270 NLRB 232, 234–235 (1984), enfd. 752 F.2d 1407 (9th Cir. 1985); *Ogden Allied Maintenance Corp.*, 306 NLRB 545, 546 (1992), enfd. 998 F.2d 1004 (3d Cir. 1993); and *Arlington Electric*, 332 NLRB 845 (2000).

[57] Based on Heibel's testimony, I have also credited Clock's testimony that Conn's written warning issued to that same employee in 1994 was an aberration. I also find it significant that the General Counsel failed to produce any other record of discipline by the PPMs although the hearing in this matter took place in 2001. Moreover, the testimony of Sevchek and Andrews showed that the responsibilities between PPMs could vary and there was no evidence that Sevchek ever disciplined or recommended discipline of any employee other than reporting to management what transpired at the jobsite.

[58] I have considered the General Counsel and Local 38's reliance on the PPM's job description as part of their contention that Sevchek was a statutory supervisor. However, job descriptions do not necessarily establish that an employee is a statutory supervisor. See *Operating Engineers Local 3*, 324 NLRB 1183, 1186 (1997); and *NLRB v. Security Guard Services*, 384 F.2d 143, 149 (5th Cir. 1967).

Board was wholly justified in finding that the employer 'assisted' it in its organizational drive. Silent approval of or acquiescence in that drive for membership and close surveillance of the competitor; the intimations of the employer's choice made by superiors; the fact that the employee-solicitors had been closely identified with the company union until their quick shift to petitioner; the rank and position of those employee-solicitors; the ready acceptance of petitioner's contract and the contemporaneous rejection of the contract tendered by U.A.W.; the employer's known prejudice against the U.A.W., were all proper elements for it to take into consideration in weighing the evidence and drawing its inferences. To say that the Board must disregard what preceded and what followed the membership drive would be to require it to shut its eyes to potent imponderables permeating this entire record. The detection and appraisal of such imponderables are indeed one of the essential functions of an expert administrative agency.

Petitioner attacks the Board's conclusion that its membership drive was headed by "supervisory" employees—Fouts, Shock, Dininger and Bolander. According to petitioner these men were not foremen, let alone supervisors entrusted with executive or directorial functions, but merely "lead men" who by reason of long experience were skilled in handling new jobs and hence directed the set-up of the work. Petitioner's argument is that since these men were not supervisory their acts of solicitation were not coercive and not attributable to the employer. The employer, however, may be held to have assisted the formation of a union even though the acts of the so-called agents were not expressly authorized or might not be attributable to him on strict application of the rules of respondent superior. . . . The existence of that interference must be determined by careful scrutiny of all the factors, often subtle, which restrain the employees' choice and for which the employer may fairly be said to be responsible. Thus where the employees would have just cause to believe that solicitors professedly for a labor organization were acting for and on behalf of the management, the Board would be justified in concluding that they did not have the complete and unhampered freedom of choice which the Act contemplates. Here there was ample evidence to support that inference. As we have said, Fouts, Shock, Dininger and Bolander all had men working under them. To be sure, they were not high in the factory hierarchy and apparently did not have the power to hire or to fire. But they did exercise general authority over the employees and were in a strategic position to translate to their subordinates the policies and desires of the management. It is clear that they did exactly that.

In *U.S. Service Industries*, 319 NLRB 231 fn. 2 (1995), enfd. 107 F.3d 923 (D.C. Cir. 1997), the Board held it was unnecessary to determine the Sec. 2(11) supervisory status of certain disputed individuals because the respondent placed them in positions where employees could "reasonably believe that they spoke on behalf of management." The Board went on to state that, "[t]herefore, we conclude that the statements and conduct of the disputed individuals are imputable to the Respondent." See also *Southern Bag Corp.*, 315 NLRB 725 (1994); *Broyhill Co.*, 210 NLRB 288, 294 (1974), enfd. 514 F.2d 655 (6th Cir. 1975); and *Aircraft Plating, Co.*, 213 NLRB 664 (1974).

In *Farmers Energy Corp.*, 266 NLRB 722 (1983), enfd. 730 F.2d 1098 (7th Cir. 1984), the Board held that, "[i]n assessing the impact of a respondent's assistance to a union, the Board examines the totality of circumstance to determine whether the respondent's conduct tainted the union's majority status." In *Farmer's Energy Corp.*, id, the Board found that the respondent employer had unlawfully assisted and recognized the CIU in violation of Section 8(a)(1) and (2) of the Act where the employer had conceived of the idea of the employees organizing, selected an employee to guide the campaign, made its facilities available to employees to discuss organizing, and directed a supervisor to ensure that employees attended organizing meetings, interjected itself in the selection of employees bargaining representatives, and engaged in an intense campaign of threats to guarantee that employees approved the agreement reached by the bargainers. The Board also found that the respondent employer violated Section 8(a)(2) and (3) of the Act by entering a collective-bargaining agreement with the CIU containing a union-security clause. In *Price Crusher Food Warehouse*, 249 NLRB 433, 439 (1980), it was held that the respondent employer violated Section 8(a)(1)(2) and (3) of the Act by granting the CIU access to its premises for organizational purposes while denying such access to a rival union, and by recognizing and entering into a collective-bargaining agreement with a union-security clause with the CIU at a time when the CIU did not represent an uncoerced majority of its employees. The CIU was found to have violated Section 8(b)(1)(A) and (2) of the Act by accepting such recognition and entering into the contract. In *Midwestern Mining*, 277 NLRB 221 fn. 1 (1985), the Board found a message from the employer's top management that it favored the CIU and would reward employees who supported that union because it would not be "that much of an expense" in sharp contrast with the employer's "outspoken and unlawful efforts to undermine employee support for the UMW," and that this conduct constituted unlawful assistance and support of a union and violated Section 8(a)(2) and (1) of the Act.

In the instant case, Lufkin's credited testimony reveals that, around the time that the Local 38 organizing drive started which was around October or November 1999, Clock told Lufkin that he and Dunfee had made plans for an independent union to quickly come in so that Local 38 could no longer "fuck" with him. Similarly, sometime before the end of December 1999, Clock told Heibel that he had talked to someone from another contractor about an independent union. During a second conversation, around this same time period, Clock told Heibel that he was going to go with the CIU to keep Local 38 out.

On November 3, 1999, Local 38 faxed a letter to Clock stating that it had obtained a card majority from Clock's employees, requested a card check by an independent party, and requested recognition. By letter dated November 5, 1999, Clock declined Local 38's request. On November 6, 1999, a form

letter was typed for the signature of Clock employees to rescind their Local 38 authorization cards. On about that date, Clock held a mandatory staff meeting, where he introduced Coughlin who spoke out against Local 38, including informing employees that if they joined Local 38 they would work a couple of weeks and then be laid off. At the end of the meeting, Clock told employees to see PPM Rohman if they wanted to rescind their Local 38 cards. Employees Skiba and Lufkin both took Clock up on his suggestion and contacted Rohman to revoke their Local 38 cards. PPM Sevchek also signed the letter rescinding his Local 38 card. I find it more than coincidental that Sevchek had been given his largest pay raise to date shortly before the November 6 letter was distributed. While this conduct, all occurred outside of the 10(b) period of the filing of the current unfair labor practice charges, I view it as background evidence and relevant to the allegations in the consolidated complaint. See *Wilmington Fabricators, Inc*, 332 NLRB 57, 58 fn. 6 (2000), and *Kaumograph Corp.,* 316 NLRB 793, 794 (1995).

As set forth above, I have found that in mid- to late-January Clock violated Section 8(a)(1) of the Act by interrogating Skiba about his and Lufkin's activities on behalf of Local 38 and soliciting grievances from Skiba, and that Clock violated Section 8(a)(3) and (1) of the Act by promising and granting Skiba and Lufkin pay raises in order to discourage their activities on behalf of Local 38. Around that same time period, Andrews, Clock's son-in-law, acting as an agent for Clock Electric violated Section 8(a)(1) of the Act by interrogating Lufkin about his and other employees' activities on behalf of Local 38 and creating the impression that employees' activities on behalf of Local 38 were under surveillance. I have concluded that during this same time period that Clock interrogated Lufkin as to his activities on behalf of Local 38, and informed Lufkin that his activities on behalf of Local 38 were futile by stating that if they brought in this other union quickly, Local 38 could no longer "fuck" with Clock.

On February 3, PPMs Sevchek and Rohman came to the Corsa jobsite. Skiba was the PPM in charge of four or five employees at the site, including Lufkin. None of the witnesses to this event testified that they looked at a watch as to the exact time of Sevchek and Rohman's arrival at the site or the length of their stay. However, there is no dispute that they arrived at the jobsite after lunch and that the employees were working when they arrived. Skiba's credited testimony reveals that Sevchek and Rohman told him that they took the day off because Clock had asked them to go around to talk about this other union. Skiba testified that he allowed them to talk to the employees because they informed him that Clock had sent them. He credibly testified Sevchek stated that employees would not have to pay union dues because Clock would make it up with a pay raise. Sevchek and Rohman asked the employees to sign a CIU card, and Skiba signed one at that time. I have concluded that PPMs Sevchek and Rohman were acting as agents of Clock Electric when they solicited employees to sign CIU cards on February 3 and 4. They were clearly aligned with Clock's known anti-Local 38 stance, and they informed employees at the Corsa site that they were acting at Clock's behest. As PPMs they had served as conduits for Clock Electric to relay orders to the men. While Skiba testified that he only thought that Rohman was a lead electrician at the time, under the facts here I do not find this determinative as Clock had previously announced to employees at a company meeting that Rohman was distributing letters for employees to rescind their Local 38 cards. Clock had placed Sevchek and Rohman in positions where employees could reasonably believe that they spoke on behalf of management. Accordingly, I have concluded that Clock Electric violated Section 8(a)(1) and (2) of the Act by its agents Sevchek and Rohman soliciting authorization cards on behalf of the CIU and by engaging in this activity during working time.[59] See *Famous Castings Corp.*, 301 NLRB 404, 407 (1991), and *MGR Equipment Corp.*, 272 NLRB 353 (1984). I have also concluded that Sevchek violated Section 8(a)(1) and (2) of the Act when he told employees that Clock Electric would pay their CIU dues by granting a pay increase. See *Baby Watson Cheesecake*, 309 NLRB 417 (1992), enfd. 148 LRRM 2896 (2d Cir. 1993).

By letter dated February 6, Seiberlich sent Clock some 30 authorization cards obtained by Sevchek and Rohman. Based on these cards Seiberlich proclaimed majority status and requested recognition. By fax dated February 8, Clock Electric granted recognition to the CIU and stated that that union would be contacted shortly to begin negotiations. I have concluded that since Sevchek and Rohman served as agents of Clock Electric in the solicitation of the CIU's cards that the cards were tainted and that they may not be used to establish that union's majority status. See *Alton Belle Casino*, 314 NLRB 611, 628 (1994). While Clock Electric is a construction industry employer and could voluntarily recognize a union under Section 8(f) of the Act, the Board held in *Bell Energy Management Corp*, 291 NLRB 168 fn. 8 (1988), that even if the respondent there was a construction industry employer, the Board would still find that its agreement with the union violated Section 8(a)(2) because Section 8(f) of the Act's terms prohibit the execution of an agreement that is the result of unlawful assistance. See *Oilfield Maintenance Co.*, 142 NLRB 1384, 1385–1386 (1963); and *Bear Creek Construction Co.*, 135 NLRB 1285, 1286 (1962).

On February 15, Seiberlich met with Clock Electric employees, at which time he appointed Sevchek and Rohman as members of the CIU's negotiating committee, and Andrews, Clock's son-in-law, was elected as a member of the CIU's negotiating committee. Seiberlich's testimony revealed between 42 to 45 employees attended this meeting including about 15 to 20 vocal Local 38 supporters. The meeting, according to Seiberlich, was held to obtain contract proposals from the employees. However, Rohman testified that some of the men were making ridiculous demands by requesting Local 38 scale for wages, and that Clock Electric pay 100 percent of insurance benefits.

[59] I have credited Skiba that he allowed Sevchek and Rohman to conduct the meeting with employees because they informed him that they came at Clock's behest. I have concluded that employees were working and that Skiba would not have called a break at that time absent Sevchek and Rohman's representations. I have concluded, as Skiba testified, that the employees were paid for time spent during the meeting, and that the meeting lasted longer than 20 minutes which would have been the time allotted for the employees' afternoon break.

Seiberlich had scheduled a negotiation session with Clock Electric on February 16, and had scheduled a followup meeting with the Clock Electric employees on the evening of February 16 in the event that the CIU and Clock Electric reached agreement on the terms of a contract. Seiberlich was the lead negotiator for the CIU committee which met with Clock Electric's committee on February 16. However, Seiberlich testified that, at the time, he conducted the negotiations he did not know the employees' existing wage rates or their benefits. Nevertheless, Seiberlich testified that they were able to reach a collective-bargaining agreement with Clock Electric on February 16, which he presented to the employees that evening. Seiberlich testified that negotiations with Clock Electric lasted from 9 a.m. to 5 p.m. However, Clock testified that the meeting only lasted a couple of hours.[60] Seiberlich met with the employees on the evening of February 16, whereupon a vote was taken by the employees on the proposed contract. Lufkin's credited testimony revealed that Seiberlich, Rohman, Sevchek, and Andrews were at the head table during the meeting, and that two people were standing near the podium where the employees voted. However, the contract was still voted down 27 to 24.

Following the vote, Seiberlich returned to Illinois and he gave authority to the CIU committee of Sevchek, Rohman, Andrews, and an employee named Gibson to continue negotiating with Clock Electric on the CIU's behalf. Seiberlich testified that he informed the CIU committee that the contract proposals were to be whatever the men wanted. Sevchek, one of the lead negotiators, testified that the CIU committee knew that they had to make some "minor adjustments" to the contract in that they could not have the employees vote twice on the same contract.

I have concluded, based on the forgoing, that negotiations between the CIU and Clock Electric for a collective-bargaining agreement were not arms length. I have also concluded that Clock enlisted PPMs Andrews, Sevchek, and Rohman to aid Clock Electric in its campaign against Local 38, and in support of the CIU, that they served as agents for Clock Electric and that Clock Electric was responsible for their conduct. See *U.S. Service Industries*, 319 NLRB 231 fn. 2 (1995), enfd. 107 F.3d 923 (D.C. Cir. 1997).[61] I have concluded that by Andrews, Sevchek, and Rohman's attendance at the CIU meetings, their status as CIU representatives, and that by their serving on the CIU negotiating committee that Clock Electric dominated and assisted the CIU in violation of Section 8(a)(1) and (2) of the Act. Skiba did not attend any of the CIU meetings. He credibly testified that, after the second or third CIU meeting, Clock told Skiba that he was not paying Skiba all of this money not to show up at the meetings. I have concluded that Clock violated Section 8(a)(1) and (2) of the Act by making this remark to Skiba.

In sum, I have concluded that Clock Electric provided unlawful assistance to the CIU in violation of Section 8(a)(1) and (2) of the Act by having its agents, Rohman and Sevchek, solicit its employees' signatures on CIU authorization cards, by allowing Rohman and Sevchek to solicit employee signatures on CIU cards at its jobsites during paid working time, by its agents promising to compensate employees for dues paid to the CIU in order to convince them to sign CIU cards, and by instructing an employee to attend CIU meetings; that Clock Electric unlawfully dominated and assisted the CIU by orchestrating a campaign where its agents, Rohman, Sevchek, and Andrews, attended CIU meetings and attended negotiation sessions as part of the CIU's negotiating committee and that by such conduct Clock Electric violated Section 8(a)(1) and (2) of the Act. I have also concluded that Clock Electric violated Section 8(a)(1), (2), and (3) of the Act by recognizing the CIU and entering into a collective-bargaining agreement with the CIU containing a union-security clause at a time when the CIU did not represent an uncoerced majority of its employees.[62] I have concluded that the CIU violated Section 8(b)(1)(A) of the Act by receiving and accepting such assistance from Clock Electric and that it violated Section 8(b)(1)(A) and (2) of the Act by accepting recognition and entering into a collective-bargaining agreement with Clock Electric containing a union-security

[60] I have credited Clock's testimony as to the length of the meeting as an admission by a party, over Seiberlich's self-serving testimony that the meeting was of longer duration.

[61] There was direct testimony here that Clock played a role and enlisted the aid of Sevchek, Rohman, and Andrews in defeating Local 38 and bringing the CIU in. Clock informed both Lufkin and Heibel that it was his intent to bring in an independent union as a means of defeating Local 38, and he specifically named the CIU to Heibel. He informed employees in November 1999 to see Rohman if they wanted to withdraw their Local 38 cards, and Sevchek and Rohman informed employees that they were soliciting employees' signatures on CIU cards on behalf of Clock. Finally, Andrews and Clock engaged in a series of conversations with Lufkin concerning Local 38, the timing and content of which demonstrate that Andrews was acting in cooperation with and at the behest of Clock in interrogating Lufkin about his activities on behalf of Local 38.

[62] Clock Electric asserts in par. 14 in its answer to the consolidated complaint that "[m]any allegations of the Consolidated Complaint are untimely and not the subject of a timely charge." Counsel for Clock Electric never identified which allegations of the consolidated complaint that Clock Electric considered to be untimely, never gave a rationale for this assertion, and did not address this contention in his posthearing brief. When counsel for the General Counsel moved to amend the complaint at the hearing to allege that the granting of wage increases was violative of Sec. 8(a)(3) of the Act, in addition to being violative of Sec. 8(a)(1) of the Act as previously alleged in the complaint, counsel for Clock Electric objected to the timeliness of the amendment, but did not contend that the proposed amendment was not the subject of a timely filed charge. Counsel for Clock Electric was given the opportunity to make an opening statement at the hearing, but declined. While counsel for the CIU asked to make a motion when the General Counsel rested and was allowed to do so, counsel for Clock Electric never asked to make any remarks at that time. As a result, the timeliness of the complaint allegations was not litigated before me and was not briefed to me by any of the parties. Under the circumstances here, noting that Clock Electric never identified which allegations of the complaint it alleged to be untimely, its failure to litigate the issue at the hearing, or brief the matter to me, I have concluded that it has not raised the Act's 10(b) limitations period in a timely fashion as an affirmative defense and such it has been waived. See *Public Service Co.*, 312 NLRB 459, 461 (1993), and *DTR Industries*, 311 NLRB 833 fn. 1 (1993), enfd. denied on other grounds 39 F.3d 106 (6th Cir. 1994).

clause at the time when it did not represent an uncoerced majority of Clock Electric's employees.[63]

The Remedy

Having found that Clock Electric has engaged in unfair labor practices within the meaning of Section 8(a)(1), (2), and (3) of the Act, and that the CIU has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act, I recommend that they be ordered to cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act. It is recommended that Clock Electric be ordered to withdraw and withhold recognition from the CIU as the exclusive bargaining representative of the employees employed by Clock Electric in the bargaining set forth in their collective-bargaining agreement effective from May 1, 2000, through April 30, 2003, and to cease and desist from giving any force or effect to any collective-bargaining agreement covering those employees, or to any extension, renewal, or modification thereof, unless and until the CIU is certified by the Board as the collective-bargaining representative of the employees. Nothing herein shall be construed, however, to require the Company to vary any wage or other substantive features of its relationship with the employees which have been established in the performance of the contract.[64] It is further recommended that the Union be ordered to cease and desist from acting as the collective-bargaining representative of the employees in the above-described collective-bargaining unit, and to cease and desist from giving any force or effect to any collective-bargaining agreement covering those employees, or to any extension, renewal, or modification thereof, unless and until the CIU is certified by the Board as the collective-bargaining representative of those employees. It is further recommended that Clock Electric and the CIU be ordered, jointly and severally, to reimburse all present and former employees employed by Clock Electric who joined the CIU for all initiation fees, dues, and other moneys which may have been exacted from them together with interest thereon as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

CONCLUSIONS OF LAW

1. Respondent Clock Electric, Inc. (Clock Electric) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 38 and the CIU are labor organizations within the meaning of Section 2(5) of the Act.

3. Clock Electric violated Section 8(a)(1) of the Act by:

(a) Coercively interrogating employees about their activities and the activities of other employees on behalf of Local 38.

(b) Soliciting grievances from employees in order to discourage them from supporting Local 38.

(c) Promising employees wage increases in order to discourage them from supporting Local 38.

(d) Creating the impression among employees that their activities on behalf of Local 38 were under surveillance.

(e) Creating the impression among employees that their activities on behalf of Local 38 were futile because it was Clock Electric's intent to bring in another union.

(f) Coercively interrogating employees as to the reasons for their activities on behalf of Local 38, and soliciting employees to quit by telling them to go work for the Union.

4. Clock Electric violated Section 8(a)(3) and (1) of the Act by granting employees wage increases in order to discourage their activities on behalf of Local 38.

5. Clock Electric violated Section 8(a)(2) and (1) of the Act by:

(a) Assisting the CIU by instructing its employees to attend CIU meetings.

(b) Assisting the CIU by having its agents solicit employees to sign authorization cards on behalf of the CIU and by those agents engaging this activity during working time.

(c) Assisting the CIU by promising employees to compensate them for the cost of union dues for that Union.

(d) Dominating and assisting the CIU by having its agents attend meetings conducted by the CIU, and serve as representatives of the CIU during collective-bargaining negotiations with Clock Electric and as stewards for the CIU.

(e) Recognizing the CIU and entering into a collective-bargaining agreement with the CIU covering the bargaining unit of all of Clock Electric's electrical classification employees, truck drivers, and warehouse personnel at a time when the CIU did not represent an uncoerced majority of those employees.

6. Clock Electric violated Section 8(a)(1), (2), and (3) of the Act by entering a collective-bargaining agreement with the CIU covering the employees in the above described unit which contained a union-security clause at such time when the CIU did not represent an uncoerced majority of those employees.

7. By receiving assistance from Clock Electric and accepting recognition from Clock Electric at a time when the CIU did not represent an uncoerced majority of Clock Electric's employees in the above described bargaining unit, the CIU violated Section 8(b)(1)(A) of the Act.

8. By entering a collective-bargaining agreement with Clock Electric covering the employees in the above described unit which contained a union-security clause at a time when the CIU did not represent an uncoerced majority of those employees the CIU has violated Section 8(b)(1)(A) and (2) of the Act.

9. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]

[63] Par. 15(A) of the consolidated complaint alleges, in part, that since December 27, 1999, the CIU unlawfully received assistance from Clock Electric, "which encouraged employees to retrieve their union authorization cards they signed on behalf of the Charging Party Union." However, no evidence was presented by the General Counsel that the alleged conduct occurred during the stated time period. Accordingly, the portion of par. 15(A) of the consolidated complaint relating to the retrieval of Local 38 authorization cards is dismissed.

[64] See *Sav-On Drugs, Inc.*, 267 NLRB 639, 646 (1983).